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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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MINING REPORTS.

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HOWARD, Admr., v. BRIGHAM.

(98 Mass. 133. Supreme Court, 1867.)

Transfer of stock—Collateral security—Depreciation. B., H. and C., owners of mining stock, authorized C. in writing to sell any part of it, subject to the approval of the other two, the proceeds to be divided among them in proportion to the stock owned by each, the first proceeds from the sales of B.'s share to stand pledged for the payment of a debt due from him to H. Afterward B. transferred the title of his stock to H. who received it "to be disposed of and proceeds paid in accordance with the foregoing agreement." Although the stock was valuable at this time, no sale was made by C., and B. did not request H. to sell any portion of that transferred to him. The stock gradually depreciated, and was finally sold by the treasurer of the company to pay assessments. *Held*, that the jury were warranted in finding that B.'s transfer to H. was a collateral security and not in payment of the debt; *Held*, also, that H. was not liable for the loss by depreciation through neglect to sell the stock, the authority to sell having been conferred upon C. exclusively.

Suit to recover a sum of money alleged to be due from the defendant to the estate of the plaintiff's testator. Writ dated September 14, 1866.

At the trial the defendant admitted his liability for the debt unless the following facts, which appeared in evidence, constituted payment thereof.

On or about November 2, 1863, the plaintiff and the defendant, together with Winthrop Coffin, being severally owners of certain shares of stock of the Victoria Mining Company, nine thousand three hundred and fifty in all, of which the defendant's portion was four thousand six hundred and eighty-six, entered into an agreement in writing, bearing that

date, setting forth that, "for the purpose of unison of action in effecting favorable sales" they agreed "to combine in one parcel the whole number of said shares" and "authorized said Coffin to negotiate for the sale of any part thereof, it being understood and agreed that any sale or sales shall be subject to the approval of the said Brigham and said Howard" and "it being also agreed that the proceeds derived from the sale of said stock or any part thereof shall be divided *pro rata* among the parties to this instrument in the proportions they have contributed stock respectively."

And the instrument contained this further provision:

"It is further agreed on the part of said Brigham, for value received, that the first proceeds from the sales of his proportion of stock are pledged for the payment of, and shall be paid to said Howard, as administrator, to the amount of $8,483.21" (being the principal sum claimed by the plaintiff in this action), "and the proceeds from sales of the stock of said Brigham over and above the said sum shall be divided as herein provided, and paid over to him."

On November 9, 1863, the defendant transferred to the plaintiff his shares of the stock and took a receipt therefor, setting forth that the plaintiff received the same "to be disposed of and proceeds paid in accordance with the foregoing agreement."

It further appeared in evidence that the stock was valuable at the time of the transaction, but became worthless before the trial; that defendant "never requested the plaintiff to sell the stock," and that no sale of it was ever made until March 10, 1866, when it was sold by the treasurer of the corporation for non-payment of an assessment of one dollar per share.

The parties consented that the question should be submitted to the jury, whether the stock was transferred by the defendant and accepted by the plaintiff on November 9, 1863, as payment of the debt in suit, or as collateral security therefor, and the defendant requested the judge to instruct them: 1. "That whether or not the debt was extinguished by the plaintiff's taking the stock in his own name, his neglect to sell exonerates the defendant from all liability therefor"; and 2. "That the legal effect of the plaintiff's receipt is to make an executed contract of their dealings, and to substitute the plaint-

iff for the defendant and Coffin; and, if the plaintiff lost the sale of the stock transferred, whether by desire to protect the stock belonging to his testator's estate, or, with Coffin, to control the market, he can not fall back on his claim for which the transferred stock was substituted, and can not maintain this action." But the judge declined so to rule, and did instruct the jury that "if the stock was held as collateral security, the mere neglect of the plaintiff to sell the same would not render him liable for the loss by its depreciation, or be a defense to the action."

Verdict for plaintiff, and defendant excepted.

E. AMES, for defendant.

H. A. JOHNSON, for plaintiff.

WELLS, J.

The agreement of November 2, 1863, clearly imposed no obligation upon the plaintiff which would make him responsible for the neglect of Coffin to make sales of the stock at the proper time. Such sales were to be subject to the approval of the defendant as well as of the plaintiff, and the plaintiff had no more right to require sales to be made at any time than had the defendant.

The transfers and receipts of November 9, 1863, do not appear to have been made upon any new arrangement, as is contended by the defendant. They merely carry out the agreement already made. By the express terms of the receipts the stock is "to be disposed of in accordance with the foregoing agreement"; and we infer that the receipts were written upon the same paper with the agreement itself. Subject to the debt for which the shares were pledged the defendant retained his control of the stock, except so far as he and the plaintiff had both alike subjected their rights to the terms of the mutual agreement of November 2d.

We think there is no ground for the argument that the transfers of November 9th, by joining the record title in the stock to the previous pledge of the proceeds thereof, constituted by operation of law, an accord and satisfaction or payment of the debt *pro tanto*. And the jury have found as matter of fact

that the stock was transferred and accepted as collateral security.

The foregoing statement of the case seems to make it sufficiently apparent that the plaintiff can not be held responsible for any loss occasioned by neglect to sell the stock. Even if the transfer deprived the defendant of all control of the shares, and conferred it exclusively upon the plaintiff, yet by the terms of his receipts, the plaintiff's right of control was made subject to the provisions of the agreement of November 2d. The plaintiff was not authorized to make sales; for by the agreement, in which both plaintiff and defendant had joined, that authority had been exclusively conferred upon Coffin, and only the right of approving or disapproving was reserved to themselves. The defendant himself had thus deprived the plaintiff of any right to dispose of the securities; and he can not now throw upon him the consequences of a failure to sell them. It does not appear that the plaintiff ever withheld his approval of any proposed sale, nor that the defendant ever requested that sales should be made.

Exceptions overruled.

STONECIFER v. THE YELLOW JACKET SILVER MINING CO.

(3 Nevada, 33. Supreme Court, 1867.)

Equitable owners bound by the contracts and compromises of the holders of the legal title. Jones was the owner of two hundred feet upon a mining claim, which was held adversely by third parties. He conveyed by deed absolute to one Osborne, with a verbal agreement that Osborne should commence suit for the premises, and upon recovery, reconvey to him, Jones, seventy feet. Osborne commenced the suit, and Jones soon after contracted with one Stonecifer to convey ten feet of the property when recovered. Afterward Osborne settled the suit, and released to the defendant. *Held*, in an action by Stonecifer against the adverse party, to whom Osborne had released, in which a conveyance of the ten feet was prayed for, that Jones had no title to convey to Stonecifer; and that the settlement of the case was binding against Jones and his grantee. *Held*, further, that if Osborne, in settling, was guilty of any breach of trust, the remedy was in damages, and not *in rem*, even if the defendant had notice of the trust, and of the subse-

quent conveyance by Jones to Stonecifer. *Held*, further, that the case involved an issue of fact (the original title of Jones or Osborne never having been admitted by the defendant) which the defendant had a right to see determined in an action of ejectment, so that equity had no jurisdiction; and as Stonecifer had at best only an equitable interest, and the party who alone could sustain ejectment had disposed of his rights, he was, therefore, deprived both in law and equity of any specific relief, and could only sue for damages.

A party in possession always has the right to buy his peace from one asserting an adverse claim, and such compromises will always be upheld where no fraud has been committed.

Right to jury trial. A party in possession, claiming title, can not be divested of that possession without a trial at law before a common law court and a jury.

Appeal from the District Court of the First Judicial District; the Hon. RICHARD S. MESSICK, presiding.

The opinion states the facts.

HILLYER & WHITMAN, for appellant.

HUNDLEY & MITCHELL, for respondent.

BEATTY, C. J.

The appellant, in the month of March, 1865, filed his complaint, alleging substantially the following facts:

That one Lyman Jones, on the first of May, 1859, located a certain mining claim two hundred feet square, which covers a part of the claim now occupied and worked by the defendant. That on the thirtieth of September, 1861, Jones deeded this claim to one Osborne by deed absolute on its face, but with an understanding or agreement that Osborne was to prosecute an action at law, at his own expense, for the recovery of the ground from which Jones had been ousted, and upon recovery he was to reconvey seventy feet to Jones; that on the same day Osborne conveyed to his counsel—Smith, Clayton & Lindsey—fifty feet of the claim as counsel fee for prosecuting the suit. That in March following (1862) suit was commenced against the Yellow Jacket Company (not then incorporated) for the mining claim located by Jones. In the Spring of 1863, whilst this suit was still pending, Jones made a contract with the plaintiff whereby he bound himself to deed ten feet of this claim to plaintiff in the event

Osborne or Osborne's administrator (for Osborne himself was dead) recovered from the Yellow Jacket Company, and conveyed to him, Jones, the seventy feet about which there was an agreement between Jones and Osborne, when the deed was made to Osborne. Shortly after this agreement was made, the suit of Osborne (or his administrator) against the Yellow Jacket Company came on for trial, and the plaintiff took a voluntary nonsuit.

In the course of that year two new suits were brought against the Yellow Jacket Company: one by Smith, Clayton & Lindsey for their fifty feet, the other by Osborne's administrator for the remaining one hundred and fifty feet. In March, 1864, both these suits were disposed of in the following manner:

On the seventh day of March, Smith, Clayton & Lindsey filed a written consent that judgment for costs might go against them.

They subsequently conveyed their interest in the mining claim to the Yellow Jacket Company. The administrator of Osborne on the ninth of March filed a like written consent that judgment might go against him for costs. He had, however, previous to that day, conveyed all his interest in the mining claim to the Yellow Jacket Company.

The complaint, in speaking of this written consent on the part of Osborne's administrator that the judgment should be entered against him for costs, says: "That the consideration moving plaintiff in said cause for the filing of such written consent as aforesaid, and the entry of such judgment was the purchase by defendant, of the said Lyman Jones of his right, title and interest to said mining claim, and the purchase by said defendant from the said W. B. Hickok, administrator of the estate of J. A. Osborne, deceased, as aforesaid, of his right, title and interest in and to said claim."

Subsequent to the dismissal of the suit, Jones conveyed all right, title and interest in the claim to the Yellow Jacket Company. The bill further charges, that when the Yellow Jacket Company took their conveyance from Osborne's administrator and from Jones, it had notice of the agreement about the ten feet between this plaintiff and Jones, and also of the Jones and Osborne agreement as to the seventy feet.

The bill concludes with a prayer that the defendant be compelled to convey ten feet undivided interest in the mining ground described, for costs, etc. The defendant first demurred, and on the demurrer being overruled, then answered. The case went to trial, and a decree was rendered in accordance with the prayer of the complaint.

The case should have been disposed of on demurrer, and it is therefore unnecessary to notice the answer or proof in the case. Respondents claim that they were entitled to a decree against the appellants because they took a conveyance from Jones whilst there was an existing contract, of which respondents had notice, between Jones and respondents for the conveyance of this ten feet of ground. No principle is better settled than that if A contract to sell land to B, but before consummating the sale conveys the same land to C, who has a knowledge of the pre-existing contract, C is in equity bound to fulfill that contract.

But that principle is wholly inapplicable to this case, for at least two good reasons: First, Jones never was bound to convey anything to plaintiff; and second, he never sold or conveyed anything to defendant.

Jones' contract to convey to plaintiff depended on two conditions: First. That Osborne should recover from the Yellow Jacket Company. Second. That having recovered from that company, he should convey seventy feet to Jones. Now, neither Osborne nor his administrator ever did recover from the Yellow Jacket Company, nor did they ever convey seventy feet to Jones.

Now, if Jones himself never was bound to convey, how is it possible that those holding under him (admitting there is any title held by conveyance from him) could be bound to convey by reason of the derivation of title from him?

But it may be answered that although the conditions never arose on which Jones was to convey, yet he himself became a party to the compromise of the suit against the Yellow Jacket, and thereby prevented the happening of the contingency on which his liability to convey depended. This is all true, and we may admit that Jones thereby became liable to plaintiff in the proper form of action for whatever injury was done to plaintiff by that compromise. But in such case, the

plaintiff's remedy, if any, was a pecuniary compensation for his loss. It was not by a conveyance from Jones, for Jones, after the compromise, had nothing to convey. That remedy must have been against Jones alone.

If one covenant to sell or convey land, and refuses to carry out that covenant, the covenantee has two remedies against him; one, an action at law for damages; the other, a bill for specific performance. Whilst the latter remedy may be enforced against either the original covenantor or his vendee with notice, the former can only be enforced against the original party. If, then, Jones violated his covenant by assenting to the compromise, he became personally liable; but that was a liability that could only affect him or his personal representatives in case of his death.

Again, on the other point. The suit between Osborne's administrator and the Yellow Jacket Company was compromised in February or March, 1864. The complaint avers that the administrator made a deed of all Osborne's interest in February, and by consent, judgment was rendered for defendant on the ninth of March, 1864. Now if Jones ever had any interest in the mining claim, the whole of it (except what was deeded to the lawyers, and that is not here brought in question) passed to the Yellow Jacket Company by the deed of February, 1864, and the judgment of March 9, 1864.

There was not a shadow of title or claim of any kind left to Jones. Consequently the deed which he subsequently executed was no more than a mere piece of waste paper. It conveyed nothing because he had nothing to convey.

The conveyance to Osborne by Jones was absolute on its face. It was made for the express purpose of allowing Osborne to prosecute the suit. If he had a right to prosecute the suit he had a right to compromise it. At least the Yellow Jacket had a right, in order to protect their possession, to compromise the suit with him, and if the title passed by such compromise it would be available to them. If Osborne, in making such compromise, violated his contract with Jones, he might be personally liable, but this could not affect the Yellow Jacket Company.

If Osborne had the right to compromise the case without

Jones, certainly the fact that Jones assented to the compromise could not invalidate it.

The complaint alleges in substance, that he was a party to the compromise which was consummated by the entry of judgment on the ninth of March, 1864, but his deed was not made for months afterward. The facts stated in the complaint show no grounds of action against the Yellow Jacket Company.

The judgment of the court below must be reversed, and the bill dismissed. It is so ordered.

LEWIS, J., did not participate in this decision.

RESPONSE TO PETITION FOR REHEARING.

LEWIS, J.

In the petition for rehearing in this case, it is urged with much earnestness by the attorneys for respondent that the conveyance from Jones to Osborne, with the contemporaneous agreement between them, raised a trust in favor of Jones; that the relation of trustee and *cestui que trust* was thus established between them as to the seventy feet to be reconveyed. It is then claimed that Jones, the *cestui que trust*, had the right and was possessed of the power either to convey *in præsenti*, or bind himself to convey at some future day, his entire interest in the trust property, even before it was recovered from the defendant; that he did covenant to convey one seventh of his interest to the plaintiff; that defendant having received a conveyance from Jones and Osborne of all their interest in the property, with notice of the trust, and of Jones' agreement to convey to the plaintiff, is bound by the trust, and may be compelled to convey to him in accordance with Jones' obligations.

In our opinion it is a matter of no consequence whatever to the plaintiff in this case, whether the relation of trustee and *cestui que trust* existed between Osborne and Jones or not; and we are of opinion at present that no such relation did exist. The common law which prevailed in the territory of Nevada at the time of the execution of that deed, unmodified as it was by any such statute as that which we now have, forbade the transfer of any disputed title or right, whether

relating to real or personal property by the person out of possession, and made all such transfers utterly void: 4 Bl. Com. 135; *Hyatt* v. *Thompson*, 3 Sanf. 430; Rawle, Cov. Title, 32–3. The deed in question from Jones to Osborne was executed whilst the defendant was in open adverse possession of the premises, and indeed it was executed for the express purpose of enabling the grantee to bring suit to recover the possession of the premises sought to be recovered. If, therefore, we should follow the rule of the common law, the deed in question would have to be treated as a nullity. Whether it was valid or not, however, is a question not necessary to be determined in this action, because it can make no difference to the plaintiff, so far as his rights in this action are concerned, whether it was void or not. It may, therefore, be left entirely out of this case without injury to him, and without any modification of his rights. Leaving Osborne out of the case, and passing over the question as to his duties and responsibilities, and Jones' rights in his character of *cestui que trust*, which are matters not necessary to be discussed in the disposition of this appeal, we have then to determine what interest or rights the plaintiff acquired by the instrument executed to him by Jones, and how those rights were affected by the conveyance and compromise which subsequently took place between Osborne, Jones, and the defendant.

The learned judge below treated the instrument from Jones to the plaintiff as an absolute obligation to convey ten feet of the Yellow Jacket ledge to the plaintiff, whilst in fact the obligation was merely contingent—depending entirely upon a recovery by Jones from the defendant. It is clear beyond all question that the plaintiff was to have nothing unless Jones' title proved to be superior to that of the Yellow Jacket Company. Hence, the only interest which the plaintiff acquired by that instrument was an interest in the action of ejectment which was then pending against the defendant in the district court, than which nothing could be more uncertain and precarious. Of this the plaintiff was fully cognizant. He knew that Jones had obligated himself to convey nothing but the doubtful fruits which might be realized from a lawsuit; that he could obtain nothing, except through a decision of the courts favorable to the Jones title.

It is conceded that no such decision was ever had, that the action instituted to test the validity of that title was compromised, and that a judgment was rendered in favor of the defendant for the costs. If the failure to recover in that action was *bona fide*, and not owing to any breach of faith or unwarrantable negligence on the part of Jones, the plaintiff would have no right of action, even against him—much less against the defendant. But it is claimed, Osborne and Jones prevented a recovery by the compromise of the action against the defendant, and the conveyances which they executed to it at that time; that they had not the authority or right to compromise the plaintiff's rights, or to defeat them by a conveyance of their interest in the property to the defendant. True, they had no such right; but we are fully of the opinion that the effect of the compromise and conveyances was to defeat the happening of the event upon which the plaintiff was entitled to a conveyance, and to confine his remedy to an action for damages against Jones. The legal title to whatever interest Jones or Osborne had to the mining claim having passed to the defendant by means of the conveyances executed to it, it is clear that they can not maintain an action of ejectment against it; and as the plaintiff has a mere equity, if anything, he can maintain no such action. Hence, we conclude the event can not transpire upon which the plaintiff was entitled to a conveyance of the ten feet of ground which he is claiming. But the defendant having been a party to the transaction by which the recovery against it was rendered impossible, can a court of equity for that reason treat the case as if a recovery had been had, and hold the defendant responsible accordingly? We think not. If it were shown that by fairly prosecuting an action against the defendant, Jones would probably have recovered the interest claimed by him, but instead of doing so, entered into a compromise by means of which the defendant obtained judgment, the plaintiff could doubtless have maintained his action against him for damages. In two cases only, however, could the defendant render itself liable to have the trust forced upon it, and a specific performance decreed against it: First, by fraudulently or wrongfully preventing the transpiring of the event upon which the plaintiff was entitled to a conveyance; and Second, by purchasing an estate

charged with a trust, with notice of the existence of such trust. If the compromise were entered into in fraud of plaintiff's rights, and the defendant was a party to that fraud, knowing Jones' title to be good, and superior to its own, clearly a court of equity would force the trust upon it, and compel a conveyance to the plaintiff. But the Yellow Jacket Company, like any other litigant, had a perfect right to compromise any action instituted against it—to buy its peace, to protect itself from protracted and vexatious litigation—by any fair means within its power. This is what it seems to have done. It is not charged in the bill in this suit that there was any fraud in that compromise, or that it was entered into for the purpose of defrauding the plaintiff or defeating his rights. If by fairly compromising an action against it any rights of the plaintiff were destroyed, that was a misfortune resulting from the peculiar nature of his rights, rather than from any wrong on the part of the defendant. It may have considered the Jones claim or title to the premises occupied by it utterly worthless, and yet compromised the action brought against it upon that title, for the purpose of ridding itself of harassing litigation. If such was in fact the case it would be monstrous injustice to hold that such compromise amounted to an establishment of the superiority of the Jones title over that of the defendant, and that thereupon the plaintiff is entitled to recover.

True, that he had not recovered or could not recover from the defendant, would be no defense to Jones, if he defeated such recovery by his own act, for he had no right to place himself in a position where he could not fulfill his obligations to the plaintiff; but the defendant was under no such obligations. It did what it clearly had a right to do, regardless of the effect it might have upon the rights of the plaintiff. There was nothing, therefore, in the action or conduct of the defendant which constitutes any answer to the objection that the fact upon which the plaintiff was entitled to a conveyance has not yet transpired, or that will relieve him of the necessity of showing a right of recovery by the strict letter of the instrument executed by Jones to him.

The same objection to the plaintiff's right of recovery may be urged, if it be attempted to charge the defendant as a pur-

chaser of the Jones claim with notice of the existence of the instrument which had been executed to the plaintiff. But it was held by the court below that the question of title between Jones and the defendant could be determined in this suit, and that if it were found that the Jones title was superior to or better than defendant's, the plaintiff would be entitled to recover precisely the same as if that fact had been determined in the action of ejectment which was compromised by the parties, or as if the fact had transpired upon which the plaintiff's right to a conveyance depended. We are, however, fully satisfied the court below was wrong upon that point. The defendant has a right to have the question of title between itself and Jones determined by a jury in an action of law. It can not be deprived of that right by the findings of the court in a proceeding in equity. The defendant being in possession of the property, there is but one way by which the title between it and another claiming adversely can be tried, and that is by an action of ejectment, and the plaintiff in such action can rely only upon a legal title. A mere equitable right or title would not be sufficient to entitle him to recover. Here the plaintiff has a bare equity, and his bill is filed simply to obtain a decree to force a trust upon the defendant, and to compel its execution. The question of title between Jones and defendant can not, therefore, be determined in this suit. We are aware that the compromise and the conveyance from Jones to the defendant would constitute a complete defense to an action of ejectment, but, as we stated before, the defendant is not responsible for that fact.

It is undoubtedly true that equity will enforce a trust not only against those persons who are rightfully in possession of trust property, but also against all persons who came into possession of the property bound by the trust with notice of such trust. But the trust can only be forced upon the legal estate acquired by the purchaser. It can not be enforced so as to bind other property belonging to him. It simply follows the legal estate to which it is attached. When that is destroyed the trust is extinguished. Until it is legally established that the Jones title is superior to that of the defendant, there is no evidence that the defendant acquired anything by the conveyance from Jones. It was in open adverse possession

of the property, upon which the plaintiff is attempting to force the trust, at the time it took the deed from Jones. The defendant doubtless acquired whatever interest he had in the Yellow Jacket ledge; but what that interest was, if anything, has not yet been properly determined. It is quite evident that no court of equity will force a trust of this character upon the defendant, until it is proven that it acquired some estate or property from its grantor, for if its grantor had nothing, the plaintiff is entitled to nothing. It is claimed that in a proceeding of this kind, if the party against whom the trust is sought to be enforced claims by a superior right of his own, it is necessary for him to set up such title; that in this case the defendant has not set up or alleged that it had any such superior title, or any other than that which it acquired from Jones; that by the pleadings it is invested with the possession and with no other title, except that which it acquired from Jones. We can draw no such conclusion from the pleadings presented to us.

The defendant, in his answer, denies that Jones ever took up, located or entered into possession of any part of the ledge occupied by it (which is a denial of the allegation in the bill), but admits the location of a surface claim in the vicinity of such ledge; then it is explicitly alleged that the conveyance from Jones and Osborne was taken simply for the purpose of compromising the action which had been instituted against it, and that the Jones title was not a valid claim to the premises occupied by it, or any part thereof, and was never so regarded; that in taking such conveyance it was not the intention to acknowledge the validity of the Jones title. There is certainly sufficient in the pleadings to show that the defendant claimed the mining ground by title superior to that asserted by Jones, and in its answer it explicitly denies that Jones had any valid title. Again, the very instrument upon which the plaintiff hinges all his rights, shows that the defendant was in possession and claiming adversely at the time of the execution of the deed, and that he was entitled to an interest in the premises only upon a recovery from the defendant, and the pleadings clearly show that no recovery was ever had. Hence, the defendant, having possession all through, and having recovered judgment in the action brought against

it upon the Jones title, the presumption is surely very strong that the defendant had the superior title.

Rehearing denied.

BROSNAN, J., did not participate in this decision.

SNOW ET AL. v. THE THOMPSON OIL COMPANY.

(59 Pa. St. 209. Supreme Court, 1868.)

[1] **Cause of action arising before incorporation of company.** Thompson contracted to buy an interest in two oil wells; afterward, an oil company was incorporated, to which Thompson transferred all his right, the vendors in the meantime receiving and selling the oil. By agreement, the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company. *Held*, that these facts constituted an original contract between the vendors and the company, and that *assumpsit* could be maintained by the company in its own name for oil received between the time of the contract and the incorporation.

Error to the Court of Common Pleas of Erie County.

Action of *assumpsit* by the Thompson Oil Company against Ambrose Snow, Joseph S. Burgess, Theodore Wright and W. S. Woods. The plaintiffs declared on the common counts. The claim filed was for a large quantity of crude oil, received by defendants from September 16 till October 11, 1864, and for cash received by the defendants for oil of the plaintiffs, sold by them; the whole claim amounting to $27,551.78. The defendants pleaded *non-assumpsit* and payment, etc.

During the progress of the trial before JOHNSON, P. J., the defendants asked leave to file a plea alleging there was not then, nor ever had been, such a corporation as the Thompson Oil Company. On objection by the plaintiff's counsel, the court refused to allow the plea to be filed, and sealed a bill of exceptions.

None of the evidence was contained in the paper-books, but the facts of the case appeared to be these: On the 16th of

[1] *Vermont Co.* v. *Windham Bank*, 3 M. R. 312.

September, 1864, the defendants contracted to sell to V. M. Thompson, individually, an interest in two oil wells or their products; they to execute a deed to him for the property. After making the contract, Thompson pledged his share of the oil to be derived from the wells to the defendants as security for notes which it seems they held against him; and the oil was run into the tanks of defendants, and marketed by them. On the 28th of December, 1864, the Thompson Oil Company was incorporated, and Thompson transferred all his interest in the wells and their products to the company. After some difficulties between Thompson and the defendants as to the consummation of the contract, it was, on the 28th of January, 1865, agreed that the deed should be made directly to the company; and it was agreed at the same time by the defendants that Thompson's share of the oil should be delivered to the company. The defendants then also released their lien on the oil, took other security from Thompson, and promised the company to replace, or account for, the oil; and made a deed to the company, which was dated back to September 16, 1864, the date of the original contract.

The defendant's first point was:

"If the jury find from the evidence that plaintiff's charter of incorporation was granted or issued on the 28th day of December, 1864, it can not recover in this action for goods or property alleged to have been sold by it from September 16, 1864, to October 31, 1864, both days inclusive."

This the court answered in the negative, as stated fully in the opinion of Judge Read.

The verdict was for the plaintiffs for $26,723.50. The defendants took a writ of error; and, amongst other things, assigned for error the denial of their first point.

B. GRANT, for plaintiff in error.

J. C. MARSHALL and J. H. WALKER, for defendants in error.

The opinion of the court was delivered by READ, J.

The only assignment of error we have to consider is the 3d. "The court erred in answering defendant's 1st point in the negative." This point is in these words: "If the jury

find from the evidence that plaintiff's charter of incorporation was granted or issued on the 28th day of December, 1864, it can not recover in this action for goods or property alleged to have been sold by it from September 16, 1864, to October 31, 1864, both days inclusive.

In testing the correctness of the court's decision as to this point, we can not do better than give the reasons they assigned for it. It is to be recollected that there was no dispute about the quantity of oil to be delivered or accounted for by the defendants; but the allegation on their part was, that V. M. Thompson, and not the Thompson Oil Company, was the proper person to maintain this action; that he was the legal owner, although the company as his transferees, were the equitable or real owners. It will be perceived, therefore, that this was a strictly technical objection arising from an old rule of law.

The court say: "V. M. Thompson made a contract with the defendants, dated September 16, 1864, for the purchase of an interest in the two wells or their production in his own name. This entitled him to the share of the products claimed to be recovered in this suit, or something near the same, but no part of it was ever received by him.

"This contract was to be consummated by a deed from the defendants, but for certain reasons owing in part, if not chiefly, to the refusal of the defendants to carry out the original contract, no deed was obtained until the 28th day of January, 1865. In the meantime, viz., on the 28th of December, 1864, the Thompson Oil Company was chartered, and acquired a legal existence, and V. M. Thompson had transferred all his interest in the purchase and its accumulations from its date, to it. In this corporation he was then a large stockholder and its principal officer and agent. When the deed came to be made after much wrangling and many hitches, it was made directly to the Thompson Oil Company. Some changes in the original contract, insisted on by the defendants, were made, affecting the interests conveyed, as well as the party purchasing. V. M. Thompson testifies that when this adjustment was effected, it was agreed by the defendants that the share of the oil to which the interests conveyed by them were entitled after the 16th of September, the date of

his original contract, should be delivered to the plaintiff. In corroboration of this statement, it is shown that the deed finally executed by the defendants was made to the plaintiff, and dated back to the 16th of September, 1864.

"Previous to this settlement and consummation of the contract, the product of these wells, due to the interests purchased by Thompson, had been pledged or hypothecated by him to the defendants as security for the notes they had against him. But at this time the oil was released from that incumbrance, and Commercial Oil Company's stock taken in lieu thereof. These facts, if believed, show a new and original promise by the defendants to deliver over and account to the plaintiff for all the oil which the interests conveyed entitled the grantee or holder to receive."

The suit is on that contract. The court were therefore right in answering this point in the negative.

Judgment affirmed.

BENNINGER v. HANKEE AND BROWN.

(61 Pa. St. 343. Supreme Court, 1869.)

Time—Conditional note. Hankee bought of Benninger an interest in a lease of a slate quarry, giving him in part payment therefor a note for $500, payable one year after date, on condition that the quarry should become worth $10,000. *Held*, that time was of the essence of the contract, and the $500 was only payable if the quarry became worth $10,000 within the year.

Time, of the essence of such contract. Where there is a promise to pay at a specified time, contingent upon the happening of a specified event within that time, the time of payment is definite, time becomes of the essence of the contract, and no liability accrues, unless the contingency provided for happens *within the time limited* for its happening.

Error to the Court of Common Pleas of Lehigh County.

Action of *assumpsit* by Thomas Benninger against Hiram J. Hankee and James Brown.

It appeared by the evidence that on the 9th of February, 1865, John Kern leased to George Newhard and Thomas Benninger for twelve years, a piece of land for the purpose of

opening a slate quarry, for a certain rent per square foot of slate taken out. On the 17th of November in the same year, Benninger, "in consideration of $500 to (him) in hand paid," assigned to the defendants "the one half right of indenture of lease * * for the residue of the term." At the same time the defendants executed and delivered to the plaintiff the following instrument:

"$500 $\frac{00}{100}$ One year after date we promise to pay to Thomas Benninger, his heirs or assigns, the sum of Five Hundred dollars without interest for value received, subject to the following condition, viz.: That should the slate quarry property for the lease whereof this is part payment be or become a very valuable property then this note to be of full effect; if the said quarry property, however, should not become to undersigned of great value then the above note to be null and void. Ten thousand dollars for the whole quarry being considered very valuable.

"HIRAM J. HANKEE,
"JAMES BROWN.

"November 17, 1865."

It was on this instrument that the suit was founded, the plaintiff claiming to recover the $500, on the ground that the whole quarry was worth $10,000.

On the trial before LONGAKER, P. J., the plaintiff offered to show by several witnesses the value of the quarry at times named posterior to the 17th of November, 1866, the date when the $500 mentioned in the note would have been payable. On the objection of the defendants the court refused the offer and sealed bills of exception. There was conflicting evidence as to the value of the quarry. The court amongst other things charged:

"The court therefore say to you that the agreement between the parties is that Messrs. Hankee & Brown, the defendants, were obliged to pay to Thomas Benninger, the plaintiff, the $500, the amount mentioned in the paper, if the entire leasehold, not the one half, but the whole of it, was worth at any time from the 17th day of November, 1865, to the 17th day of November, 1866, the sum of *ten thousand dollars*." * *

"The real question for your consideration and finding is: Was the leasehold at any time in that year worth to the de-

fendants the said sum of $10,000, or could they have sold it for that amount, in such a way as I have already indicated, then the plaintiff is entitled to recover the $500 with interest from the 17th day of November, 1866, up to this date. * *

"I may here say to you that it devolves upon the plaintiff to show affirmatively that the whole lease was worth at least the $10,000, at some time during the year; that his testimony must be stronger than that of the defendant, so as to outweigh it; because if there should be an equipoise (neither stronger than the other), there can be no recovery. * * *

"The plaintiff in proving value must overcome the inference, which may be justly gathered from the transaction itself, that at the time of the execution of the agreement of sale and purchase and at the giving of the conditional note—the parties themselves did not consider the lease worth $10,000; but that they supposed its future value might be or would become $10,000 or more. Upon the happening of that event, the $500 would become due and payable at the maturity of the *note*. It is therefore a condition precedent as to the value of the lease, and the contingency must have happened before the plaintiff can recover. Did it then happen? The plaintiff says it did, and that the fact of value is shown not only by his own witnesses, but by the cross-examination of defendant's witnesses also. * * *

After referring to the evidence the court proceeded: "You will therefore review all the evidence of the plaintiff and pass upon it as a whole; taking into consideration the relative value of this lease, as compared with the prices for which other land sold in that locality, and ask yourselves whether the plaintiff's testimony presents such a state of facts as will entitle him to recover. If it does not, then there will be an end to his case. If, however, it does, then you will proceed to examine the testimony of the defendant, and find whether his proof will prevent a recovery, when weighed against and compared with the evidence of the plaintiff. * * *

"It is, however, for you to marshal all the testimony, and ascertain whether the lease was worth at any time from November 17, 1865, to November 17, 1866, the sum of $10,000; if it was, then the plaintiff is entitled to recover, if it was not, the verdict must be for the defendant. If you find for the

plaintiff he will be entitled to interest on the $500 from November 17, 1866, to this date."

The verdict was for the defendants: the plaintiff removed the case to the Supreme Court and assigned for error the rejection of his offers of evidence and the charge of the court.

J. D. STILES, for plaintiff in error.

C. M. RUNK and S. A. BRIDGES, for defendants in error.

The opinion of the court was delivered May 11, 1869, by WILLIAMS, J.

All the assignments of error in this case raise but one question, and that is, What is the proper construction of the note or instrument upon which this suit was brought? The defendants promised, in substance, to pay the plaintiff one year after date the sum of $500, if the quarry property mentioned in the note should be, or become, of the value of $10,000. The promise was not absolute, but conditional. It was not to be performed at an indefinite time, upon the happening of the contingency, but at a definite or specified time, if the contingency had then occurred. Time was an essential element of the contract, not only as it respects the promise, but as it respects the happening of the contingency upon which it was to be performed. A promise to pay at a specified time, if a particular event should happen is essentially different from a promise to pay upon the happening of the event, or whenever it should occur. In the former case, the time for the performance of the promise and the happening of the event is definite, and no liability arises on the promise unless the event happens within the time limited for its performance; in the latter, the time for the performance of the promise and the happening of the event is indefinite, and the obligation to perform arises upon the happening of the contingency whenever that may be. In this case the defendants, as we have seen, promised to pay the note in one year after date if the quarry property should become of the value of $10,000. There is no room for doubt as to the meaning of the contract. The defendants were bound to pay the note at maturity if the contingency had then occurred, for this was their promise;

but if the contingency had not occurred, they were under no obligation to pay it, for by the very terms of the contract the happening of the contingency was an essential condition upon which their liability was to arise. And it is equally clear that the defendants were under no obligation to pay the note if the contingency occurred after its maturity, for they did not promise to pay it in that event. They only promised to pay it if the contingency should happen at or within the time fixed for its payment. If it did, then, as expressly stipulated, the note was "to be of full effect," otherwise it was "to be null and void." This was their whole promise—"it hath this extent, no more."

It follows that the court was right in rejecting the evidence offered by the plaintiff for the purpose of showing the value of the quarry property after the maturity of the note, and before the bringing of the action; and in the construction given to the note in the charge. Nor has the plaintiff any reason to complain of the manner in which the case was submitted to the jury. It was tried with great fairness and impartiality, and the learned judge was clearly right in instructing the jury that it was for them to marshal all the testimony and ascertain whether the lease was worth at any time between the date of the note and its maturity, the sum of $10,000; and if it was, that then the plaintiff was entitled to recover; if it was not, that their verdict must be for the defendants.

Judgment affirmed.

SUFFERN ET AL. v. BUTLER ET AL.

(21 N. J. Eq. 410. Court of Errors and Appeals, 1869.)

Construction—Covenant by lessee to purchase—Evidence. An agreement indorsed on a mining lease that "the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said B. the sum of $10,000, in lieu of the ten per cent. agreed upon in said lease; then the said B. shall make a good and lawful deed of conveyance for the above described premises in the within lease," construed to be upon its face an absolute contract by the lessee to pay and purchase at the end of two years, and in the absence of fraud or misrepresentation, it was *held*, that parol evidence was inadmissible to explain it.

Application of the rule excluding parol contradictions. Where a writing is not ambiguous, and there is no allegation of fraud or mistake, its words taken in their usual meaning must be construed as expressing the true intent of the contracting parties, and the rule excluding resort to parol evidence, must be applied.

The opinion of the Chancellor, from which this appeal was taken, is reported in 4 C. E. Green (19 N. J. Eq.), 202.

RANSOM & BRADLEY, for appellants.

WOODRUFF and A. S. PENNINGTON, for respondents.

WOODHULL, J.

The appellants found their claim to relief wholly upon the instrument called the mining lease, the effect of which, as they insist, is to give them a perpetual right to enter and to conduct mining operations upon certain lands of the respondents. Another agreement, stated to have been executed some days after, but bearing the same date as the lease and indorsed thereon, is set out at length in the bill, not because anything was claimed under it, but for the purpose of raising and pressing upon the attention of the court a question of construction, which the appellants perceived to be vital to their case. It should be observed that there is no allegation in the bill that the indorsed agreement is in any respect different from what the parties intended it to be; that there has been anything left out of, or added to it, through fraud or mistake. But taking the writing as it stands, the appellants endeavor to show that its true purpose and meaning was not to affect in any way the terms of the mining lease, so far as the respondents are concerned, but merely to confer upon the original lessees an additional privilege, which they might exercise or not, at their option; and that they having, at the proper time, elected not to exercise it, the agreement has ceased to exist as a contract. If the appellants are able to maintain this construction, they may be entitled to the relief for which they ask; if they can not do this, the very foundation of their suit fails: For if the indorsed agreement should turn out to be absolute, and not in any sense conditional or optional, the inevitable effect of it will be to control and modify the stipulation of the mining lease, so as to restrict the oper-

ation of that instrument to the term of two years from its date; a term which had already expired before the commencement of this suit. What, then, is the true construction of the indorsed agreement? Does it mean that the lessees were to pay the $10,000 at the end of two years, unconditionally, or only that they were to do so in case they should elect to take the property? The language is, "That the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said William and Daniel Butler, etc., the sum of $10,000 in lieu of the ten per cent. agreed upon in said lease, then the said William and Daniel Butler shall make, etc., a good and lawful deed of conveyance for the above described premises in the within lease," etc. Considering this instrument as standing alone, and giving to its words their plain and ordinary meaning, we have failed to discover in it anything to support the construction contended for on the part of the appellants. Its stipulations are that one party *shall pay*, that the other party then *shall convey*. The obligation to convey is made to depend upon the payment, but the obligation to pay, or, in other words, to purchase the property at the end of two years, is made absolute and unconditional, as clearly so as language could well make it. For, while it is true that this writing is neither grammatically expressed nor skillfully drawn, it is equally true that the substantial parts of it, the terms of the contract, are so clear, definite and certain as to leave little room for construction. It is nothing to the purpose to say that the real meaning of the parties was that the payment of the $10,000 should be conditional, and at the option of those under whom the appellants claim. The plain answer is, that we are asked not to reform, but to construe this agreement, and in the absence of any allegation of fraud or mistake, we are bound to presume that if such had been their meaning they would have used words proper to express it, or at least words which might, without doing violence to the laws of language, bear that signification. If they have failed to do this, they have placed themselves beyond the power of any court to help them by construction. For, while courts are always solicitous to ascertain and carry into effect the real intentions of the parties, they can do this only within certain well-established limits. "The rule of law," says

Professor Parsons, "is not that the court will always construe a contract to mean that which the parties to it meant, but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ when properly construed, and the rules of law will permit. In other words, courts can not adopt a construction of any legal instrument which shall do violence to the rules of language, or to the rules of law": 2 Parsons on Con. 494, 495.

The indorsed agreement then, taken by itself, can not be judicially understood to mean what the appellants contend for. Can it be so understood when considered in connection with the mining lease? It is urged on the part of the appellants, that these two writings, although executed at different times, are evidently parts of one and the same transaction, and should therefore be construed together, and with reference to each other, for the purpose of ascertaining from both the real intention of the parties; that considered in this way, their construction of the second will be found to be the only one not repugnant to the terms of the first; and that it is unreasonable, if not absurd, to suppose that of two agreements made and executed so nearly together as these were, between the same parties, written upon the same paper, bearing the same date, and relating to the same property, the second could have been intended to operate to the destruction of the first. The force of this argument depends entirely upon the assumption that the two agreements were not only executed as parts of one transaction, but that they were conceived at the same time. It would be absurd to suppose that the parties intended to grant a perpetual right, and at the same moment of time intended to restrict that right to two years. But if the second agreement had no existence even in the minds of the parties, until after the execution of the other, as we think sufficiently appears from the statements of the bill and from the testimony, instead of being absurd or unreasonable, nothing would seem more likely than that the second agreement should have been intended to modify in one way or another, the terms of the first. It is further urged by the appellants, that their construction, even if not appearing from the writings themselves to be the true one, must nevertheless be taken to be true as

against the respondents, on the ground that by their own acts and admissions, they are estopped from denying it.

Where the language of a written contract is ambiguous, or otherwise doubtful, such evidence is admissible, and may be very convincing to show the real intent of the parties. But to admit it when the language is so clear and explicit as to leave no room for doubt as to its meaning, would be to disregard the familiar rule, which while it permits the introduction of evidence from without, for the purpose of explaining, prohibits it for the purpose of contradicting or varying a valid written contract: 2 Parsons on Con. 547.

Not finding in either of these instruments, considering them separately or together, and in the light of the circumstances under which they were executed, anything to warrant us in holding the second agreement to be conditional or optional against the plain import of its language, and not being permitted in such a case to resort to evidence outside of the writings for the purpose of imposing upon them a meaning different from that which appears clearly on their face, our conclusion is that the appellants have failed to make out their case, and must therefore be denied the relief which they ask for.

Other questions of much interest, relating chiefly to the execution and character of the contract called the mining lease, are treated of in the opinion of the Chancellor, and were fully and ably discussed before this court, but the conclusion we have come to on the question of construction, which met us at the threshold of the case, renders it unnecessary to consider the others.

Let the decree of the Chancellor be in all things affirmed.

The whole court concurred.

VAN DUSEN ET AL. v. THE STAR QUARTZ MINING CO.

(36 California, 571. Supreme Court, 1869.)

Tunnel contract—Provisions. A company owning a quartz ledge, having contracted for the running of a tunnel to cut the same, and having promised the plaintiff to pay for provisions to be furnished the tunnel

contractor, in case the contractor failed to reach the ledge, is bound upon such promise to pay, the tunnel being abandoned without reaching the lode.

[1]**Statements not proof of agency.** The statements of an assumed agent are not evidence of the fact of the agency, nor of the resumption of an agency which the party knew had once ceased.

Foreman's purchase—Company liability. If a mining company has for a long time recognized the acts of its foreman in buying goods for it, and paid for them, it is liable for goods ordered by him for it from the same parties after the agency ceases, if they have no notice that the agency has ceased.

Liability to assignee. This liability of the principal is the same to the assignee of the demand, even if the assignee had notice before the goods were sold that the agency had ceased.

A party having notice of the contents of a writing, has notice of its legal effect.

Renewed agency must be proved. Where an agency has terminated, and the fact is known to third parties (creditors), such third parties can not presume a renewal of the agency from the mere fact of the old agent being again found conducting operations at the mines of the company.

Appeal from the District Court, Fourteenth Judicial District, Nevada County.

The defendant was a corporation. The plaintiffs, prior to December, 1867, had furnished goods to the defendant upon the order of Withington, who was the foreman of the works and mine of the defendant. On the 11th day of December, 1866, Withington made the contract in writing with the defendant to run the tunnel referred to in the opinion of the court. In January, 1867, Mr. Allen, one of the trustees of the defendant, showed the plaintiff, Van Dusen, this contract, and he read it. Soon after this Withington commenced running the tunnel. Afterward, and on the 6th day of July, 1867, Withington entered into another contract in writing with the defendant, by which he was to have the privilege of taking rock from the ledge and working the same in the defendant's mill, at his own expense; and he was, after paying expenses, to apply the surplus of the proceeds of the rock to the work of prosecuting the tunnel. The plaintiffs had no notice of this contract. After this contract was made, work

[1] *Brown* v. *Gaston Co.*, 1 M. R. 380; *Union Co.* v. *Rocky Mt. Bank*, 2 Colo. 565.

was renewed on the mill and ledge, and work on the tunnel was prosecuted at the same time. The goods sued for were furnished on Withington's order between the 8th day of May and 6th day of September, 1867.

The plaintiffs' testimony tended to show that Hershey had for about five years before December, 1866, furnished the defendant with meat, on Withington's order, and continued so to do until September 9, 1867, without any notice that Withington's agency had ceased. Both the plaintiffs and Hershey charged the goods on their account books to the defendant.

On the trial the plaintiffs introduced in evidence the declarations of Withington made to Van Dusen, plaintiff: First, in December, 1866, that "they were going to work on the tunnel, and wanted provisions, and that defendant would pay for them;" and second, in July, 1867, that "they were going to take out rock again and crush it, and wanted some more provisions, and the defendant was to pay for them." To this testimony the defendant objected, on the ground that Withington's declarations were not binding upon the defendant; but the court overruled the objection. The plaintiffs recovered judgment, and the defendant appealed.

The other facts are stated in the opinion of the court.

T. B. REARDON, for appellant.

A. A. SARGENT, for respondent.

CROCKETT, J.

The plaintiffs sue for several amounts alleged to be due to them for goods sold and delivered. The first count in the complaint is on a special contract to the effect that the defendant promised the plaintiffs if they would furnish certain provisions to Withington & Co., who were running a tunnel for the defendants, and in the event that Withington & Co. failed to reach the ledge, the defendant would pay for the provisions. The averment is that the provisions were furnished on this agreement; that the rock turned out to be so hard as to be impervious, and Withington & Co. were unable to reach the ledge, and by reason thereof the defendant became liable under its contract to pay for the provisions.

The second is the ordinary count for the price of goods sold and delivered by the plaintiffs to the defendant; and the third count is for a butcher's bill alleged to have been due from the defendant to one Hershey, and which was assigned to the plaintiffs.

The plaintiffs had a verdict and judgment, and the defendant, having made a motion for a new trial, which was denied, has appealed.

The proof under the first count was, in some degree, conflicting; but, in our opinion, the weight of the evidence was in favor of the plaintiffs. At all events, we can not disturb the verdict on this branch of the case, on the ground that the plaintiffs failed to prove their cause of action, as alleged.

The proof under the second count is, that one Withington had been for several years the foreman of the defendant's quartz mill and mine, during which period he had been in the habit of ordering from the plaintiffs provisions for the use of the hands at the mine and mill, and the bills therefor had always been paid by the defendant without objection; that in December, 1866, a written contract was entered into between the defendant, on the one part, and Withington and two other persons of the other part, whereby the latter agreed to run a tunnel for the defendant, and on the terms therein stated; and it was a condition of the contract that if Withington & Co. should not succeed in reaching the ledge, the defendant was to defray the expense of the provisions used during the prosecution of the work; that the plaintiffs had notice of this contract, and that work was being done on the tunnel under it. There was evidence tending to show that work on the tunnel had to be abandoned before the ledge was reached, because the rock became too hard to be worked. The tunnel was therefore abandoned, and work at the mine and mill was resumed as formerly, Withington apparently acting as foreman, in the same manner as he had done before the tunnel was commenced. Under these circumstances he purchased from the plaintiffs the goods mentioned in the second count of the complaint, saying he was purchasing them for the defendant, who would pay for them.

The defendant objected to the proof of his declarations, as incompetent evidence; and it appears that Withington was

in fact working the mine on his own account, under a written contract with the defendant, of which the plaintiffs had no notice. The proposition of the defendant is that the plaintiffs had notice of the contract for running the tunnel; that this was sufficient notice that the agency of Withington as foreman for the defendant had ceased; that when the tunnel was abandoned and work was resumed on the mine and mill, the plaintiffs were not authorized to infer that the former relations between Withington and the defendant had been re-established; and that the defendant did nothing to warrant or encourage that belief.

We think the contract for the tunnel was sufficient notice to the plaintiffs that the agency of Withington as foreman was at that time terminated. It contains a provision that Withington and his associates were to have the use of the defendant's tools, and were to keep them in repair at their own expense, and were to purchase all the provisions of the defendant then on hand; "and further, to make the said Star Company at no expense whatever, except as above stated." It further appears from the contract that the compensation for running the tunnel was to be one thousand five hundred dollars, whenever that amount shall have been realized from the rock to be taken from the ledge after it shall have been reached; the defendant "to take charge of the mill and mine when the ledge as aforesaid is reached or the mill commences crushing."

These provisions make it plain that during the progress of the work Withington was not acting as foreman for the defendant in any matter pertaining to the mine and mill. The plaintiffs admit that they had full notice of this contract, and they must be held to have known that the agency had ceased. But after the tunnel was abandoned, operations at the mine and mill were resumed and carried on, apparently as they had been before, and no notice was given to the plaintiffs that Withington was conducting the work on his own account, and not for the defendant. Under these circumstances, were the plaintiffs authorized to deal with him as the agent of the defendant? We think not. When the agency had once ceased and the plaintiffs knew it, the declarations of Withington were not competent evidence to establish a new agency;

and there is no proof that the defendant performed any act tending to delude the plaintiffs into the belief that Withington had again become its agent. It permitted him, it is true, to work the mine and mill at his own expense and for his own benefit; but as the plaintiffs were aware that the former agency had ceased, they had no just right to conclude that a new agency had been established, from the mere fact that Withington was again conducting operations at the mine. The court, therefore, erred in admitting in evidence the declarations of Withington as to his agency; and so much of the verdict as relates to the cause of action set up in the second count of the complaint is unsupported by the evidence.

We can not disturb the verdict so far as it is founded on the cause of action alleged in the third count. The course of dealing between Hershey and the defendant was sufficient proof of the original agency; and the testimony is conflicting in respect to the knowledge of Hershey that the agency had terminated. We can not say that the verdict on this branch of the case is unsupported by the evidence.

There is nothing in the record to enable us to ascertain the precise amount of the erroneous recovery on the second count of the complaint; otherwise we would modify the judgment, and affirm it as to the remainder of the recovery.

The judgment is therefore reversed, and the cause remanded for a new trial, and remittitur directed to issue forthwith.

Judgment reversed.

REDDINGTON & Co. v. HENRY ET AL.

(48 N. H. 273. Supreme Court, 1869.)

Tender of insufficient title. Where there is an agreement for the sale of an interest in land and the vendor (or lessor) refuses to execute an instrument completing it, but insists upon tendering an inferior or lesser estate, the contract may be regarded as broken and the purchaser may sue for the consideration advanced with interest.

Subscription for lease. A subscription paper called for a lease of oil land as soon as 25 shares of $100 each were paid. This amount being paid, there was tendered a lease reserving one fifth royalty and also surface

rights. *Held*, that the $2,500 was the sole consideration, and that the subscribers were entitled to a lease clear of royalty and reservations.

Return of title papers. It is not essential that papers which have come to the hands of plaintiffs but were not accepted as passing any title, should be returned before bringing suit. They should be filed with the clerk for use of parties in interest.

Assumpsit for money had and money paid. Writ dated June 13, 1866.

The plaintiffs introduced a subscription book the terms of which were as follows: "We, the undersigned, promise to take the number of shares set against our respective names, and to pay to James E. Henry and Charles C. Moulton the sum of one hundred dollars ($100) for each and every share so subscribed. The said J. E. Henry and C. C. Moulton hereby obligate themselves to lease to each and every shareholder for the period of thirty years his proportion of twenty-five shares of $100 each in the following described pieces or parcels of land situate in the township of Musa, county of Middlesex, Canada West, and being strips number one to four in lot 22, second range north, containing ten acres; said leases to be given as soon as the full amount of twenty-five shares of $100 each shall be subscribed. Littleton, N. H., November 20, 1865."

Three witnesses were examined on the part of the plaintiffs, Cyrus Eastman and the plaintiffs, Henry C. Reddington and George B. Reddington. Their testimony tended to prove the following facts: The plaintiffs signed the subscription book aforesaid for one share of $100, on or about the 21st of November, 1865; and on or before the 27th of the same month, paid that sum to the defendants. On the 27th of that month, the plaintiff and other subscribers met at J. Farr's office in Littleton, and chose a president, secretary and treasurer. The defendant Henry appeared at the meeting, stated that the twenty-five shares had been subscribed and paid for, and delivered the subscription book to the subscribers.

The principal question considered at this meeting was whether a lease should be given to each subscriber, or one lease to one of them, to be held in trust for all; and it was decided to have one lease, and Cyrus Eastman was selected to take it as trustee.

Henry assented to this arrangement, and said he had author-

ity to execute the lease for Moulton, and was ready to give one then in his own and Moulton's name. But the subscribers preferred that the lease should be executed by Moulton himself. It was then arranged that a lease should be drawn running to Eastman, taken to Boston, where Moulton then was, executed by him and Henry, and sent to Eastman at Littleton. It was understood that Evarts W. Farr, who was one of the subscribers, and has acted as counsel for the plaintiffs in this suit, and is one of the subscribers who have agreed to share in the expense of carrying on this suit, should make a draft of the lease. It was testified by the plaintiffs and Eastman that they understood Farr was to draw the lease for the defendants and as their attorney. There was no evidence that it was referred to Farr to decide on the form of the lease, except the fact that he was one of the subscribers.

Printed forms of leases, corresponding in form with that which was afterward executed and tendered by the defendants, were brought into this meeting by Henry, and lay there on the table open to inspection; but they were not presented to the meeting as the form in which the lease was to be given, nor adopted or amended by the meeting, and the plaintiffs testified that they did not read or understand what the terms and conditions of the blanks were.

On the 28th of November, 1865, the draft of a lease was made at Littleton by E. W. Farr, taken to Boston, there executed by the defendants, and sent to Eastman at Littleton. The particular time when it was executed and sent to Eastman did not appear, but it was received by Eastman not many days after the 28th of November, 1865. Since the lease was received by Eastman the word "two" in this lease has been erased and the word "thirty" substituted by direction of the defendant Henry. A copy of the lease which is marked A is to be made part of this case.

There was no evidence that any steps were taken by the subscribers in reference to the acceptance or rejection of the lease until the 9th of December, 1865, when Eastman presented the lease to a meeting of the subscribers, who then decided that they would not accept the lease, because, as they said, it did not conform to the terms of the subscription. They objected generally that it did not agree with the terms of the

subscription, but their principal objection appeared to be to the reservation of one-fifth of the oil, which was called the *royalty*.

There was no evidence to show what notice, or that any notice, was given to the defendants of the action of the subscribers in rejecting the lease, till the 18th of December, 1865, when the defendant Henry was present with the plaintiff George B. Reddington, Cyrus Eastman and others, and Reddington and Eastman informed Henry that the lease was not sufficient, and that the subscribers would not accept it.

About the first of January, 1866, the defendant Henry met Cyrus Eastman, the plaintiff George B. Reddington, and other subscribers. At this meeting the subscribers insisted on their objections to the lease, and were told by Henry that the defendants could not obtain a release of the *royalty*, and could not give a lease without that reservation. It was then proposed that Henry should endeavor to sell one half of the ten acres for $2,500, to be paid to the subscribers, and the subscribers proposed to take the $2,500, and a lease of the other half on the terms of the lease which had been drawn, but it was stipulated that this arrangement should not affect the right of the subscribers to insist on a lease according to the terms of the subscription. Henry was to have about thirty days to negotiate the sale and Eastman offered to assist in obtaining a purchaser. Henry did not effect a sale, and about the end of February met the plaintiff George B. Reddington, and told him he could not then make a sale and wished the matter might rest a while, as he thought in the spring he could sell.

On the 11th of April, 1866, the plaintiff George B. Reddington, Cyrus Eastman and other subscribers met the defendant Henry; and Reddington for the plaintiffs demanded a lease that would agree with the terms of the subscription. Eastman also demanded a like lease for himself and those whom he represented. Henry said it was out of his power to give such a lease as was demanded; that he could not obtain a release of the *royalty*.

Eastman then asked Henry if he was willing to pay back the money to the subscribers. He said for his own part he was willing, but he could not answer for Moulton, who was

then in Boston, and requested delay for the purpose of consulting with Moulton. There was no agreement to give him time, but he requested that a suit might not be commenced immediately, and was told that there would be no occasion for haste in suing. He then said he should be round in about two weeks, and in the meantime would write to Eastman.

On the second day of May, 1866, the plaintiff, George B. Reddington, and Eastman met the defendant, Henry, and Henry told them he had been to Canada, and could then give a lease according to the subscription. Reddington and Eastman told him it was then too late; that delay had not been given him for that purpose, but to obtain the money; that they wanted the money back. Henry then demanded the subscription book, which was refused, but he was offered a copy. The subscription book, since it was delivered to the subscribers on the 27th of November, 1865, has remained in their possession, and has never been tendered to the defendants; the lease has also been in their possession, and has not been offered to the plaintiffs since it was received, but it has been altered, as before mentioned, by direction of Henry.

Before the 11th of April, 1866, the premises agreed to be leased had declined in saleable value, and at that time had no market value as oil lands. The plaintiffs took no measures to examine the land, and had no information in respect to it except what was derived from common report and the representations of the defendants.

After the evidence on the part of the plaintiffs was concluded, the defendants moved for a non-suit, and made the following exceptions to the case of the plaintiffs:

1. The lease furnished by the defendants to the plaintiffs was a compliance with the contract.

2. The action of the plaintiffs after the lease was furnished was an election to adhere to the contract.

3. The evidence shows no rescinding of the contract so that this action can be maintained.

4. The offer of the defendants to furnish a lease such as the plaintiffs had requested, was a compliance with the contract under the circumstances.

The court denied the motion for a non-suit, whereupon a verdict was taken for the plaintiffs by consent, subject to the opinion of the court.

The questions arising on the foregoing case were reserved and transferred.

J. FARR & SON and HIBBARD, for plaintiffs.

H. & GEO. A. BINGHAM, for defendants.

NESMITH, J.

The original subscription paper, signed by the plaintiffs, and delivered to defendants, established the foundation of the contract between these parties. This was executed about the 21st of November, 1865. The plaintiffs having paid all the money which the terms of their contract required, the obligation was then cast upon the defendants to make and execute to them, together with the other shareholders, or associates, the several leases of the land for which they had paid, agreeably to the terms and fair intent of their said original bargain.

A fair construction of the language employed by the parties would seem to require of the defendants the delivery of such a lease as would give to the plaintiffs for the term of thirty years, a good title and free enjoyment of the said premises described in the subscription paper.

The contract did not express or imply that the lessee should pay any more rent; the one hundred dollars being regarded in the nature of an advancement of plaintiff's share of rent for the whole term. The past fulfillment of the contract would, therefore, require from the defendant a lease of the premises mentioned in said subscription paper, unincumbered by any claim of additional rent, or other like imposition, or any uncommon reservation or new condition, or burden of any kind whatsoever. The parties had a legal right to vary their contract by mutual agreement, so far as to substitute one joint lease for several; the covenants of the new lease to remain the same as originally provided. The lease, as prepared by the defendants, and furnished to the plaintiffs and their associates on the 9th day of December, 1865, was rejected by them, as not conforming to the original contract. Was this lease, which was then tendered to the lessees, such an one as they, as reasonable men, were bound to accept?

On recurring to it, we learn that the leading object of this demise from the defendants was to enable the lessees to procure from the lands therein described, oil or petroleum, and other mineral productions lying in, on, or under the said premises, and for erecting necessary buildings for working and storing the products of this nature, and for other purposes connected therewith. We find also the following reservations incorporated into said lease: "Reserving to the defendants, as lessors, the use and occupation of all such parts of the demised premises as shall not be required for the purposes aforesaid, for agricultural purposes."

Then again, we find another condition in the lease, that the said lessees shall pay to the lessors annually one shilling during said term; and also the more important provision, which was cause of special objection by the lessees: "That they must deliver to the lessors one fifth part of all the oil which the said lessees shall obtain from the demised premises during said term, or, at the option of the lessees, they may pay to said lessors at the times stated in said lease, the cash value of said oil at the oil wells." This last provision is what is denominated the royalty in the language of the case. Superadded to the three new provisions, the duration of the term of the lease, when presented to the lessees, was reduced to two years, but at some subsequent period of time, not stated when, Henry struck out two years and inserted thirty. As early as the 18th of December, 1865, Henry, one of the defendants, had notice from one of the plaintiffs and Eastman, the agent of the lessees, that the lease was not sufficient, and that the subscribers, or lessees, would not accept it.

On the first day of January, A. D. 1866, the defendant, Henry, again met the subscribers and informed them that he could not obtain a release of the royalty, and that they could not give a lease without that reservation. On the 11th day of April, the said Henry again informed the plaintiff George B. Reddington, and Eastman, the agent, that it was out of his power to give such a lease as was demanded, as he could not obtain a release of the royalty; and then the case finds that both Reddington and Eastman made at this time a special demand upon Henry for such a lease as should conform to the original contract, and also requested Henry to refund the

money received by them toward the contract. The case shows that some other events subsequently transpired, not affecting materially the questions at issue between the parties.

Under the facts as here disclosed we have no hesitation in arriving at the conclusion that the aforesaid provisions which were incorporated into the lease, and not found in the subscription paper, were such material variances, conditions, burthens or incumbrances as furnished to the lessees sound and substantial reasons for refusing to accept the lease as a fulfillment of the contract of the defendants, and, of course, furnished to the plaintiffs just cause for the rescission of their contract, and for demanding and recovering back their money paid under it. The contract remained open and executory, to be fully completed by defendants, only by the delivery of such a lease as would conform to the original contract of the parties; and when the final demand was made on the 11th of April, 1866, for the lease, the defendants were bound to have had ready a good unincumbered lease of the whole lands embraced in the subscription paper, to be quietly enjoyed by the lessees for any and all useful purposes, for the term of thirty years, free from the new conditions which were embraced in the instrument against the will of those who had paid their money.

We think the plaintiffs had waited a reasonable time to enable the defendants to fulfill their contract, before the demand was made, and the right of action has now fully accrued to plaintiffs to recover the money by them paid. The delays granted to the defendants were at their request, and for their special accommodation. If the purchaser demand such a deed as the contract calls for, and the vendor refuse to give it, but insists on his receiving a different and inferior title, the contract may be regarded as broken, and the purchaser may sue at once and recover the money paid: *Foote* v. *West*, 1 Denio, 544; *Baker* v. *Robbins*, 2 Denio, 136; *Camp* v. *Morse*, 5 Denio, 161; *Lawrence* v. *Taylor*, 5 Hill, 107; *Judson* v. *Waas*, 11 Johns. 525; *Little* v. *Paddleford*, 13 N. H. 167; *Swan* v. *Drury*, 22 Pick. 485; Browne on the Statute of Frauds, sec. 122 and notes; *Funar* v. *Nightingale*, 2 Esp. 630; *Shove* v. *Webb*, 1 Term, 732.

The cases clearly show that the right in the vendeé of land under a parol contract to recover back what money he has advanced or paid, is confined to those cases where the vendor has refused, or become unable, to carry out the contract; the plaintiff himself having faithfully performed or offered to perform his part of the contract. The case, *Fletcher* v. *Button*, 4 Comstock, 396, shows the following facts: At the time of the execution of the covenant to convey, and for some time afterward, the defendant's lands were incumbered by a heavy mortgage; and the defendants were unable to convey a good title, and on this ground neglected and refused, when a deed was demanded. It was held by the court that the purchaser was released from his agreement. If a seller will not give an assurance when reasonably demanded, he loses his bargain and the purchaser is not bound to wait until he is able to convey. If the purchaser has paid his money, he may rescind the contract, and recover back the purchase money paid with the interest thereon. In such case the vendor holds the money without consideration: *Allen* v. *Webb*, 24 N. H. 278; 8 Johns. 257.

Under our view of the law of the case, applicable to the facts stated, we see no grounds for any presumption that the jury could be justified in finding the delivery of a valid lease to the lessees. The lease offered was not the one contracted for, and is found of no value to the plaintiffs. It is suggested that it should have been returned, with the subscription paper, to the defendants, before the action was brought. These papers appear to us to be entirely worthless, except as evidence of the shadow of things not seen—at least by the plaintiffs. We are of the opinion they should be filed with the clerk of the court, to be preserved for the future use of those in interest.

In *Perley* v. *Balch*, 23 Pick. 283, Chief Justice SHAW says, "that where the property is worthless, its return would be a useless ceremony which the law *never* requires." In *Thurston* v. *Blanchard*, 22 Pick. 18, the same judge remarks that after the plaintiffs claims to elect to rescind such contract as exists here, the obligation of contracts not assignable ceases to be binding and of any value, and of course need not be returned before the action is brought.

We are of the opinion that the ruling of the court in this case was right, and that there should be

Judgment on the verdict.

BAINBRIDGE ET AL. V. GEHRING ET AL.

(3 West Virginia, 240. Court of Appeals, 1869.)

Stockholders not liable to each other for corporate default. Five parties formed a coal and oil company, to which they transferred a piece of land owned by themselves. Gehring and Winchester, the plaintiffs, transferred a separate tract which they owned alone. They were to receive from first profits $810 for this piece of land. Before any profits were received, the lands were sold. *Held*, that plaintiffs were entitled to this sum, if it had been received on sale of the lands, as well as if it had come to the company in the shape of profits; but as the bill neither charged the defendants (the three other associates) with receiving consideration for the lands, nor profits out of them, it stated no cause of action.

This cause arose in Taylor county in 1864. The opinion of the Judge contains a statement of the material facts.

N. RICHARDSON and W. G. BROWN, for the appellants.

MAXWELL, J.

Ignatius Gehring, Hiram Winchester, Morgan D. Bainbridge, William Corothers and Samuel Corothers entered into a contract in writing to form a joint stock company under the name of the Whiteday Cannel Coal and Oil Company. Gehring and Winchester were the owners of a tract of 137 acres of land, and the five parties were together the owners of another tract of 463 acres, which were to form the basis of the company. The capital stock was to be 60,000 dollars, divided into 600 shares, to be divided as mentioned in the agreement. The contract contained the following stipulation: "And it is further agreed that the said Gehring and Winchester shall receive from the profits of the first coal that is sent to market $810 of the company's money as a recompensation for the excess which the said Gehring and Winchester paid for the above

named 137 acres of land over the four dollars and nine cents per acre for the last named tract of 463 acres. The parties afterward applied to the circuit court of Taylor county, and obtained a charter according to the terms of the agreement. Shortly after the charter was obtained the company sold the lands held by it to another company, and after this, Gehring, in his own right and as assignee of Winchester, filed his bill to recover from the other parties the said sum of $810, and the court rendered personal decrees against Bainbridge and William and Samuel Corothers, each for 124 dollars and 33⅓ cents, their relative proportion of the sum of 810 dollars, according to the stock held by them respectively in the said company. From this decree they have appealed. The parties, by their agreement, did not contemplate that the appellants, Bainbridge and the Corothers should be personally liable to the parties for the 810 dollars, but the sum was to be paid from the profits of the first coal that was sent to market out of the company's money; but it is charged in the bill and admitted in the answer, that before any profits were realized, the lands were sold. This being true, then, Gehring and Winchester would be entitled to receive the sum from the proceeds of the sale of the property, if it sold for sufficient to pay them, but in neither aspect would the appellants be liable personally unless they had actually received the proceeds of the sale in the one case, or the profits of the coal sent to market in the other. The bill does not charge that any profits were made on coal shipped, and that such profits were received by the appellants, and should have been dismissed on the hearing. The order of this court will, therefore, be to reverse the decree complained of, with costs to the appellants, and proceeding to enter such decree as the court below ought to have rendered, will dismiss the bill with costs.

Judges BERKSHIRE and BROWN concurred, but Judge BROWN was of opinion to remand the cause with leave to amend the bill if desired.

Decree reversed.

ROSE CLARE LEAD CO. v. MADDEN ET AL.

(54 Illinois, 260. Supreme Court, 1870.)

[1] **Alteration of contract—Demurrer to bill.** A lead company filed a bill to enjoin an ejectment from premises, of which it was the lessee by assignment, and also to correct a mistake in the lease in the description of the premises. Defense by demurrer that the lease had been forfeited by an erasure therein. *Held*, that as it did not appear from the face of the bill that defendant was not a party to the erasure, the demurrer was erroneously sustained, and that defendant must raise the question by answer.

Error to the Circuit Court of Hardin County.

WILLIAM H. GREEN and JAMES M. WARREN, for the plaintiffs in error.

WESLEY & WILLIAM P. SLOAN, for the defendants in error.

The opinion states the case.

LAWRENCE, C. J.

In 1850 one William Pell executed a lease to Valle and others, of certain mining property, describing it as being in section 32, township 13 south, range 8 east, when it was in fact in township 12 south. The lease was first drawn with a provision that it should terminate if the lessees ceased to work for one year, but as the lease now stands, this provision has been erased, and there is a note of the erasure at the foot of the lease. This lease was executed in January, 1850, and in the following December a new agreement was executed between these parties, referring to the lease, and providing that the lessor should give six months' notice before forfeiting the lease. The lessees worked the mine for about a year, and then ceased to work. In 1864 the lease was assigned to the complainant, and during the same year the company took possession of the premises and commenced work, expending in machinery the sum of $5,000, as averred in the bill. In 1865 the mistake in the description of the premises was discovered, and the grantees of the lessor thereupon commenced

[1] See *Cheney* v. *Barber*, *post* 65.

an action of ejectment. The lead company then filed this bill to enjoin the ejectment and correct the mistake in the lease. The cause was heard on a demurrer to the bill, and the court dismissed the bill.

It is urged, as a ground for affirming this decree, that the agreement of December, 1850, shows that the original lease must have contained the provision for a forfeiture of the lease, in case the lessees should cease to work the mine for a year, and that its erasure, without the consent of the lessor, forfeited the lease.

Admitting it to be a fair inference, from the tenor of the subsequent agreement, that the erasure was not made before the execution of the lease, it is by no means clear that it was afterward made fraudulently or without the knowledge of the lessor. The fact that, by the subsequent agreement, he waived the right of forfeiture, except upon six months' notice, while it shows there was such a clause in the lease as originally written, also shows the parties had agreed upon a different provision, and it may well be that the original clause was then erased by consent, and the alteration noted at the foot of the lease as having been made before its execution. But be that as it may, there is absolutely nothing in the bill from which any complicity with the alteration can be presumed against this complainant. This company did not become the assignee of the lease until nearly fourteen years after the second agreement was executed, and if a fraudulent alteration was ever made it was in all probability made before the execution of that agreement, as there would have been no motive for it afterward. We are clearly of opinion that, on the face of this bill, there is no such presumption against this complainant of a fraudulent alteration with which, or a knowledge of which, it is chargeable, as to prevent it from claiming the correction of an acknowledged mistake in the description of the premises. The bill, on its face, entitles the company to relief. The defendants, in their answer, can raise this question of fraudulent alteration, if they desire, and it can then be determined upon proof, instead of relying upon uncertain inferences from the face of the bill.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

HILLYER ET AL. v. THE OVERMAN SILVER MINING COMPANY.

(6 Nevada, 51. Supreme Court, 1870.)

Attorney's contract with corporation—Power of officers—Presumptions. Plaintiff proposed in writing to do the legal business of the defendant for a year at $250 per month. *Held*, that statements by the officers of the company that it had accepted the proposition would not bind the company when in fact it had not done so. *Held, also*, that the fact that bills for the salary claimed were presented, allowed and paid, for a series of months, would raise the presumption that plaintiff's proposition was accepted, but such presumption is entirely destroyed when it is affirmatively shown that the proposition was not submitted to or acted on by the board of trustees.

Direct proof of a fact overcomes all presumptions to the contrary.

The trustees of a corporation can bind it only when they are together as a board, acting as such.

Appeal by The Overman Silver Mining Co. from the District Court of Storey County, First Judicial District.

WILLIAMS & BIXLER, for appellant.

HILLYER, WOOD & DEAL, for respondents.

LEWIS, C. J.

A judgment was recovered by the plaintiffs in this case against the Overman Silver Mining Company for the sum of five hundred dollars, upon a contract claimed to have been entered into between themselves and the defendant, by the terms of which the company agreed to pay them a salary of two hundred and fifty dollars a month, during the year 1869, for transacting and attending to its legal business. This salary was regularly paid up to the month of July, at which time the defendant refused to make any further payment, claiming that it had entered into no such contract with plaintiffs as claimed by them. The only question now in the case is, whether any agreement to continue for the term of a year was in fact executed by the defendant. The court below found there was, and thereupon rendered the judgment from which this appeal is taken, but we find the evidence does not warrant such a result. It appears that at the request of the

defendant's superintendent, the plaintiffs, in the month of December, A. D. 1868, submitted a written proposition to the defendant, whereby they agreed to transact and attend to all the legal business in which the defendant might be interested in the State of Nevada during the year 1869, for the sum of two hundred and fifty dollars per month. It is not claimed by the superintendent, nor does it appear to have been the understanding of plaintiffs, that that officer had the authority to execute a contract of that kind on behalf of the defendant. Neither was there any attempt on his part to do so. The evidence shows that he asked plaintiffs to make a proposition so that he might submit it to the company, and not with a view to acting upon it himself. The proposition was given to the superintendent, who sent it to the president or secretary at San Francisco.

As the superintendent did not pretend to execute the contract, or employ plaintiffs, it is necessary only to determine whether the board of trustees, who alone were the authorized agents of the company to represent it in the making of such contract, executed it. It is not claimed that any contract was made, except by the acceptance of the proposition submitted by plaintiffs. Was it accepted by the board of trustees? We think it is not proven that it was, but the converse rather is established by the defendant. The secretary of the company, whose duty it was to be present at the meeting of the board, and to keep minutes of its proceedings, testifies that the proposition of plaintiffs was never brought before the board, or acted on by it. Several of the officers undoubtedly knew of the proposition, and may have led plaintiffs to believe, by conversations and otherwise, that their proposition had been accepted; but these officers, who could not bind the company in a contract of this kind by directly executing it on its behalf, certainly could not impose any such liability upon it by simply persuading a person that the corporation itself had done so, when in fact it had not. As the case is presented here, neither the president, superintendent, nor both, had the power to execute the contract sued on. That authority is by law vested in the board of trustees, and it is not claimed that it had been delegated to those officers, or that they had been authorized by the board to act for them.

It is shown by plaintiffs that bills were presented to the board for the salary claimed by them, and that they were allowed, and, indeed, paid. This evidence would doubtless raise the presumption that the plaintiffs' proposition had been accepted by it, and was sufficient to justify that conclusion were it not overborne by direct evidence that such was not the case. Here it is affirmatively shown that the proposition was not submitted to or acted on by the board, and thus the presumption which might otherwise arise from its action allowing the bills is entirely destroyed. Why the claims were allowed and the money ordered paid to plaintiffs, is a question not necessary to be inquired into. It is sufficient here that they did not accept the proposition.

There can be no valid executory contract unless there be a meeting of the minds of the respective parties upon its terms and conditions. "There is no contract," says Parsons, "unless the parties thereto assent, and they must assent to the same thing in the same sense": 1 Pars. Con. 399. Can it be said that the board of trustees of the Overman Company assented to the terms proposed by the plaintiffs in their proposition, when it is sworn the proposition was never brought before it, or in any way acted upon by it, and indeed the board did not know of its existence, as appears to be the case? The trustees can only bind the corporation under our law when they are together as a board, acting as such: *Yellow Jacket Co.* v. *Stevenson*, 5 Nev. 224. The plaintiffs' proposition not having been brought to the knowledge of the board, it can not be presumed it knew anything of it, and consequently can not be held to have accepted it. The burden of establishing the contract was upon the plaintiffs; having failed to do this, the judgment must be reversed.

PEASE v. BROWN ET AL., BROWN ET AL. v. PEASE.

(104 Massachusetts, 291. Supreme Court, 1870.)

Agreement relative to mineral land construed. P. and B. agreed in writing concerning certain lands owned by P. but occupied by squatters, that P. would extinguish the squatters' claims by compromise within

sixty days after B. should pay P. $5,000, but if P. found it impracticable to compromise, he was to take legal measures to extinguish the claims, and in the latter event B. was to pay to P. such sums as should be needed for the purpose, not exceeding $2,000. If P. could effect the settlement, B. was to pay the $5,000 to P., or such part thereof, as he might desire within thirty days after notice from P. P. also agreed to convey the land to B. for $50,000, including the said $5,000, and to put B. in possession in sixty days, with the right to appropriate the ore and minerals thereon, etc. B. was not to be personally liable for any sum except the $5,000, the property being security for the balance. P. compromised with some of the squatters, but made no final settlement; he then made a supplemental agreement with B., providing, among other things, that B. should pay to P. $1,500 on the contract within sixty days, and also a $1,000 more in ninety days if P. required it to settle with the squatters. *Held*, 1. That B. did not agree to pay P. absolutely, but only such part thereof as P. should need to effect a settlement with the squatters. 2. That the $1,500 paid by B. under the modified contract, was not paid as the consideration of such modification, but to be applied by P. toward the sum needed to settle with the squatters. 3. That P. could not charge against the $5,000 a sum which he had promised to one of the squatters as the purchase price of a parcel of land outside of the tract, such purchase being in excess of his authority.

Pleading—Instructions. In an action by B. against P. to recover money paid under the foregoing contract, the declaration contained two counts in tort and one in contract, all for the same cause of action. *Held*, that after striking out certain portions of the declaration, it still set forth a good cause of action. *Held, also*, that the court properly refused certain instructions asked by P., which are fully set forth in the body of the case as reported.

Proof of understanding in cases of fraud. On an issue between A and B as to whether B was induced to pay A money upon his false representations that it was needed for a certain, stated purpose, if A contend that B, when he made the payment, did not understand that the money was to be used for that purpose, but for another purpose, it is competent for B to testify that he paid the money, supposing that it was to be applied to the first purpose.

Appeals from the Superior Court of Suffolk County.

The first case was an action against John N. Brown, Abiel Abbott, John S. Abbott, and William A. Abbott. The first count of the declaration alleged that the plaintiff on and ever since July 15, 1863, owned a tract of 470 acres of land in West Virginia, which was then subject to claims of so-called squatters, and on that day entered into an agreement under seal with the defendants, which, after reciting his ownership

of the land and the existence of such claims, contained stipulations of which the parts material to this cause were as follows:

"Said Pease hereby agrees with said Brown and others, that he will extinguish the claims of said squatters by compromise with them, if the same can be done for a reasonable sum, and cause them to remove from the premises above described within sixty days after Brown and others shall have paid to him the sum of $5,000."

"If it shall be found by Pease impracticable to effect a settlement with said squatters on reasonable terms, instead of being required to make such settlement, he is to resort to proper legal measures to relieve the real estate of them and their claims. And in such case Brown and others shall pay to Pease from time to time, within thirty days after request, such sums as may be needed for said purpose, not exceeding in all $2,000, until the claims of said squatters shall be extinguished."

"And further, if Pease shall find he can effect a settlement with said squatters and shall wish for said $5,000, or any part thereof, for that purpose, Brown and others are to pay him said sum of $5,000, or such part thereof as he may desire, within thirty days after notice from Pease."

"Said Pease also agrees with said Brown and others, their associates, successors and assigns, that he will convey said real estate to them by good and sufficient deed with usual covenants of warranty." "But Pease is not to be required to execute such deed, until said Brown and others, their associates, successors and assigns, shall have paid to him, his assigns or legal representatives, $50,000; the before mentioned $5,000 being a part of said $50,000 and of the $9,500 mentioned below, and the $50,000 payable as follows: $200 to be paid on July 22, 1863; and $300 on or before December 1, 1863; $9,500 (which sum includes the before mentioned $5,000) on or before December 1, 1864; $10,000 on or before December 1, 1865; $10,000 on or before December 1, 1866; $10,000 on or before December 1, 1867; and $10,000 on or before December 1, 1868."

"Said Pease hereby authorizes and permits said Brown and others, their associates, etc., to commence the occupation of

said real estate at any time after sixty days from this date; and sooner, if Pease is able sooner to effect a settlement with said squatters; and to make any erections or improvements thereon, and any excavations, and to take therefrom and appropriate to their own use any ores, minerals, coal and other substances, in or on said real estate; but in case said Brown and others shall attempt possession before such settlement with said squatters, Pease is not to be made liable for any claims of said squatters on account of the acts and doings of said Brown and others, their associates, etc., while he is effecting the extinguishment of their claims in manner before described. But such occupation is not to continue, except upon the condition that the aforesaid payments, amounting to $50,000, shall be promptly made in the manner before described. And in case there should be a failure to make any of said payments, all the erections and improvements upon said real estate, which shall then have been made, shall be forfeited, and shall become the property of Pease, his heirs or legal representatives."

"Said Brown and others are to make reasonable efforts in such way as they may deem judicious, for the purpose of developing, working and bringing before the public and into market, the minerals and ores on said real estate; but they do not incur any personal liabilities for the payment of the said $50,000, or any part thereof except the aforesaid $5,000, or the aforesaid $2,000 as the case may be, and the aforesaid $500. But the security for the payment of all sums, except as aforesaid, is upon the property itself and upon the improvements which may be made thereon, as before described."

"If no settlement should be effected with the squatters, and no arrangements made by which said Brown and others can commence the occupation of said estate for the purposes and in manner aforesaid, peaceably and without danger of collision and trouble, within sixty days from this date, then, and in such case, all payments named and specified in this indenture, except such as shall then have been made, are to be deferred beyond the time when they would be otherwise payable, just as long as said Brown and others shall be delayed occupancy beyond said sixty days."

"And it is further agreed that if, from unforeseen causes, said Brown and others, their associates and assigns, should fail to make any of the payments mentioned in this indenture, excepting always the before mentioned $500, and the $2,000 or the $5,000, as the case may be, there is to be no forfeiture nor loss of right to occupy, if any such payment should be made within sixty days from the time when the same shall be payable."

The count further alleged that the plaintiff extinguished the claims of the squatters, and did everything on his part required by the terms of the agreement to be done before the full contract price of $50,000 should be paid by the defendants; that he "did find that he could effect a settlement with said squatters, and did wish for the said $5,000 mentioned in said agreement for the purpose of effecting such settlements and the expenses necessarily incident thereto, and thereupon gave notice to the defendants of his wish for said $5,000, and demanded the same; yet the defendants, although the thirty days after such notice and demand have long since elapsed, and the first day of December, 1864, when the defendants promised absolutely by said contract to pay the plaintiff the said sum of $5,000, has long since elapsed, have neglected to do and perform on their part, everything whatever in said agreement agreed to be done and performed on their part, and have never paid the whole of said $5,000, but only a portion thereof; to wit, $2,442.85," and that the defendants owed the plaintiff the balance of $5,000, with interest from and after such notice and demand.

The answer admitted the making of the agreement, but denied all liability of the defendants to the plaintiff thereon, for the reason that they were induced by him to enter into it by means of false and fraudulent representations; alleged that he utterly failed to do the things in the agreement stipulated to be done by him in relation to extinguishing the claims of squatters; further alleged that on his request, and for the purpose pretended by him that he needed certain moneys to enable him to extinguish such claims, they paid him moneys more than sufficient to extinguish all such claims, and more than he in fact paid or was called upon to pay to extinguish them, and he misappropriated the moneys to his own use;

and denied all the allegations in the declaration, except such as were expressly admitted.

At the trial in the superior court, before REED, J., the parties agreed that the defendants paid the plaintiff $200 on July 22, 1863; $1,000 on September 26, 1863, and $242.85 upon an acceptance of Abiel Abbott in his favor on or before January 2, 1864, and on January 16, 1864, gave him their promissory note for $1,500 payable in sixty days, and paid it at maturity, making a total of payments from them to him of $2,942.85; and it was proved that on or about August 10, 1863, he paid William Waggy, one of the squatters, $800 in extinguishment of all his claims, which covered two hundred and thirty-six of the four hundred and seventy acres, and that on April 26, 1865, he extinguished the claims of William King, another squatter, by paying him $850, and there was no evidence that he paid any other sums to squatters, nor any evidence that there were any other squatters than Waggy and King, except by inference from letters of the plaintiff, dated after August 10, 1863, which were put into the case and contained allusions to "the remaining squatters" and "their claims," and from a supplemental agreement of the parties hereinafter mentioned. It appeared also that on June 11, 1864, the plaintiff drew on the defendants for $1,500; that the draft was duly presented to them for acceptance, on the same day, with a written request of the plaintiff that they would accept it "in accordance with the stipulations of agreement of July 15, 1863," and that they refused to accept it. The plaintiff relied on this evidence of his draft and letter to sustain his allegations of notice and demand.

The plaintiff in putting in his case introduced in evidence a supplemental agreement made under seal between him and the defendants on January 16, 1864, modifying the agreement of July 15, 1863, by providing, first, that "said Abbotts and Brown are hereby permitted to make a division of the real estate described in said agreement into two nearly equal parts, and to negotiate a sale for either or each of said parts; and in case they shall succeed in effecting a sale of either or both within one hundred days from this date; and within that time shall give to Pease written notice, Pease is to convey by deed of warranty, within ten days after the receipt of said

notice, to such persons or company as they in said writing may request, either of said parts, upon payment to Pease of a sum which, with the payments that have previously been made, shall amount to $35,000"; and, secondly, that "Said Pease is to deed the other part of said real estate to such parties or company as they may in writing request, in the manner before stated, provided they shall pay to said Pease, at the time of the delivery of the deed, a sum which, with all the other payments made by them at or before the delivery of said deed, shall amount to $45,000; payments to be made and deed to be given within a hundred and twenty days from this date, and upon the same conditions as to time, notice and place as before stated; and it is further agreed and understood that if it shall be more convenient to said Pease, in making settlement and arrangements with squatters and abutters, to change somewhat the boundaries of said tract, so as to have more river front below the present survey, and to obtain portions of land adjoining in the rear, which will work advantageously with the tract possessed, and make more desirable boundaries, he is at liberty so to do." The two final paragraphs of this supplemental agreement were as follows:

"It is also agreed that Pease shall have at least thirty days beyond the sixty days specified in the third paragraph of the original agreement—namely, ninety days, for effecting a settlement with said squatters after the receipt of the amount specified in said paragraph, if the same shall be necessary.

"This modification of the agreement is made with the understanding that said Abbotts and Brown are to pay to Pease the sum of $1,500 on said contract within sixty days hereof, according to the terms of their promissory note of even date herewith, and also the further sum of $1,000, if Pease shall require, within sixty days from this date, for the purpose of settling with said squatters; provided Pease shall give to either of said parties thirty days' notice of his requiring the same. Said $1,000 is not to be required or paid as above, unless and until Pease shall be requested to give a deed to the northerly part of said tract. If such payment or payments shall not be so made this modification is to be utterly void and of none effect, and Pease shall have the same rights under the original agreement, and the same claims for breach thereof

against the other parties, as if this modification had not been adopted."

The plaintiff contended that the note for $1,500, given to him by the defendants on January 16, 1864, was given as the consideration for this modification of the original agreement, and that "by proper construction of said modification the defendants would be precluded from having any part of said $1,500 applied in extinguishment of the so-called squatters' claims or moneys paid."

"The judge gave such construction to the modification, and ruled in accordance with the above position of the plaintiff; whereupon the defendants offered to prove by oral testimony that said $1,500 note was given upon the agreement with the plaintiff that the money to be paid thereon should be used in extinguishing the claims of the squatters, and should be taken as a part of the $5,000 named in the original agreement to be expended for that purpose; but the judge ruled that such oral testimony could not be introduced."

At the close of the evidence, the judge refused a request of the defendants for a ruling that it would not sustain the action, and also refused a request of the plaintiff for a ruling that "upon the true legal construction of the agreement of July 15, 1863, he was entitled to recover of the defendants $5,000, less the sum which had been paid in part toward said $5,000"; and submitted the case to the jury, with instructions that the plaintiff was entitled to recover only so much of the $5,000, with interest from the date of the writ, as they should find that he found necessary to settle squatters' claims, and demanded of the defendants, in addition to the $2,942.85 agreed to have been paid by them to him, less the $1,500 paid on their promissory note of January 16, 1864, and less also $500, namely: the $200 paid on July 22, 1863, and $300 more on account of the payment of $300 stipulated in the original agreement to be made by them on or before December 1, 1863. Under these instructions the jury returned a verdict for plaintiff for $789.55; and both parties alleged exceptions.

E. P. BROWN, for the plaintiff.

J. S. ABBOTT, for the defendants.

MORTON, J.

1. The first question which arises in this case is, as to the construction of the provision in the contract of July 15, 1863, by which the defendants agree that "if Pease shall find he can effect a settlement with said squatters, and shall wish for said $5,000, or any part thereof for that purpose, Brown and others are to pay him said sum of $5,000, or such part thereof as he may desire, within thirty days after notice from Pease." We have no doubt that the construction of this clause adopted at the trial in the superior court was correct. It is not an undertaking to pay $5,000, absolutely, but only such part of it as the plaintiff desired and needed for the purpose of effecting a settlement with squatters. Provision is made in a subsequent part of the contract for the payment of such part of the $5,000, as is not needed to extinguish the claims of squatters. The contract also contains provisions, by the fair construction of which the defendants were to pay the plaintiff in place of the $5,000, a sum not exceeding $2,000, for the purpose of ejecting the squatters by legal proceedings, in case the plaintiff found it impracticable to effect a settlement with them; showing that the parties did not understand, as now claimed by the plaintiff, that the $5,000 was to be paid absolutely upon his request. The exceptions of the plaintiff therefore can not be sustained.

2. A question of more difficulty arises upon the construction of the agreement made January 16, 1864. This is a modification of the original agreement, and contains the following provision: "This modification of the agreement is made with the understanding that said Abbotts and Brown are to pay to Pease the sum of $1,500, on said contract within sixty days hereof, according to the terms of their promissory note of even date herewith, and also the further sum of $1,000, if Pease shall require, within sixty days from this date, for the purpose of settling with said squatters, provided Pease shall give to either of said parties thirty days' notice of his requiring the same." At the trial the presiding judge ruled that this sum of $1,500 was paid as the consideration for said modification, and that it was not to be applied by the plaintiff to the extinguishment of squatters' claims, nor accounted for

by him as a part of the said sum of $5,000. We are unable to concur in this construction of the agreement. There is nothing in the terms of the modification which indicates that this sum of $1,500 was to be received by the plaintiff to his own use, and not as a payment under the contract. It is not stated to be the consideration of the new agreement. On the contrary the agreement provides that it is to be paid "on said contract." These words necessarily refer to the contract of July, 1863, as modified by this agreement. There is no other contract to which they can refer, and we think they are decisive against the construction claimed by the plaintiff. This sum of $1,500 thus paid on said contract must be applied toward the sum of $5,000, or such part thereof as was needed to settle with the squatters. There is no other payment required by the contract, to which it can apply. We are therefore of opinion that the plaintiff is bound to account for this sum as a part of the money paid to him for the purpose of extinguishing the claims of squatters. Upon the evidence at the trial it appeared that, if he was charged with this sum, he has been more than paid for all sums needed for this purpose, and therefore the court should have instructed the jury, as requested by the defendants, that he was not entitled to recover anything under the first count in his declaration. These views render the other exceptions taken at the trial immaterial.

Defendants' exceptions sustained.

At the new trial in the superior court, before BRIGHAM, C. J., after this decision, "the only controversy between the parties was, whether the plaintiff could claim, for the purpose of settling with squatters, anything beyond what had already been paid to him for that purpose, which it was agreed was the sum of $2,442.85." It was further agreed that the plaintiff had paid $800 to Waggy and $850 to King, and no more; but he contended that he was entitled to be allowed $1,000 more, on account of an oral agreement made between him and Waggy, in their negotiations for the purchase by him from Waggy, for that sum, of a lot of one hundred acres outside of the tract of four hundred and seventy acres. The other material facts are stated in the opinion. The judge instructed

the jury that "if the consideration of Waggy's relinquishing his squatter's title was $800, that sum was all which the plaintiff could properly call upon the defendants to pay under the contract, notwithstanding Waggy's agreement to extinguish his squatter's title for $800 was coupled with and dependent upon the plaintiff's agreement to purchase other land of Waggy not included in said tract, for the sum of $1,000." The verdict was for the defendants; and the plaintiff alleged exceptions, which were argued in March, 1871, by the same counsel.

MORTON, J.

When this case was before the court at a former term, it was decided that the plaintiff was entitled under his contract, to demand and receive of the defendants only so much of the $5,000 named in the contract as he found necessary for the settlement of squatters' claims.

At this trial it appeared that the plaintiff had received from the defendants, for the purpose of settling with squatters, the sum of $2,442.85, and that he had paid the sum of $1,650, namely, $850 to King and $800 to Waggy. He testified that in August, 1863, he settled with Waggy, paid him $800, and received a quitclaim deed of his interest in the four hundred and seventy acre tract described in the contract. He also testified that at the same time, as an inducement to Waggy to give the quitclaim deed, he orally promised to purchase of Waggy a lot of land wholly outside of the four hundred and seventy acre tract, containing 100 acres, for $1,000, to be paid within a short time. This money has never been paid, and nothing has been "done by the plaintiff or Waggy in carrying this agreement into effect." The only question now before us is, whether the plaintiff is entitled to recover this sum of $1,000.

The presiding judge ruled that upon the evidence the plaintiff was not entitled to recover it, and we are of opinion that this ruling was correct. The plaintiff has not paid the amount, and it does not appear that he is under any legal liability to pay it. But if he is, we do not think he could recover it of the defendants. By the contract, he was made their agent, with authority to settle the claims of squatters,

and to call upon them for such sums as he needed for that purpose, not exceeding $5,000. They were to pay him such sums as were needed to extinguish the claims of squatters. The contract with Waggy to purchase a distinct parcel of land was not fairly within the scope of his authority, and was not binding on the defendants. There is no hardship in requiring the plaintiff, before he entered into an agreement of this character, not contemplated by his contract with the defendants, to consult with and take the instructions of his principals. Not having done so, and the act being in excess of his authority under the contract, he can not recover from the defendants the amount he agreed to pay for the land.

Exceptions overruled.

The second case was an action of tort, with an alternative count in contract, brought by the defendants in the previous case against the plaintiff therein. Writ dated June 22, 1869. The declaration contained three counts, alleged to be for the same cause of action.

The first count alleged that on July 15, 1863, the parties entered into the written agreement or indenture of that date, the material parts of which are quoted in the report of the other case; that the plaintiffs were unacquainted with lands in West Virginia, and particularly with the tract of four hundred and seventy acres referred to in the agreement; but that the defendant was well acquainted with said tract and its minerals and its value, and with other mineral lands in that region; and that he induced them to enter into the agreement by false representations concerning said tract and its minerals and value, and said other mineral lands, which representations the count alleged in detail; that on July 22, 1863, they paid him $200, and on September 26, 1863, $1,000; on January 16, 1864, gave him their promissory note for $1,500 payable in sixty days, which was paid at maturity; and on September 1, 1863, gave him an acceptance of Abiel Abbott in his favor in the sum of $400, upon which they paid him certain amounts; that "said acceptance and all of said sums were so paid under and in consequence of the indenture obtained as aforesaid, and because the defendant assured the plaintiffs that said sums, draft, note and acceptance, were needed, and were to be used,

to extinguish the claims aforesaid of said squatters, whereas, in fact, said sums were not so needed, and were not so used, but were misappropriated by the defendant to his own use"; and that, "in consequence of said misrepresentations of the defendant, they were and have been subjected to large expenses, and have devoted much time in examining said four hundred and seventy acre tract, and having one of their number, to wit, said William A. Abbott, go to West Virginia for that purpose; the whole amount claimed by the plaintiffs as damages under this count being $5,000 with interest thereon from aforesaid dates when paid to the defendant."

The second count also in tort, was as follows: "And the plaintiffs say the defendant has converted to his own use $3,500 of current money, the property of the plaintiffs; under this count the plaintiffs will claim the same money described in the first count."

In the third count which was in contract, the plaintiffs alleged the making of the original written agreement or indenture, and the payment of moneys and an acceptance to the defendant as alleged in the first count; and alleged "that said acceptance and said several sums were paid and given to the defendant under said agreement and indenture; and that the plaintiffs were induced to pay and give the defendant said sums and acceptance in consequence of the false representations and statements fully set forth in said first count; and the plaintiffs claim said several sums and amounts as moneys had and received by the defendant to the plaintiffs' use, and moneys paid by the plaintiffs to the defendant, with interest thereon from said several dates of payment."

This action was tried in the superior court before BRIGHAM, C. J., at the same time with the second trial of the action of this defendant against these plaintiffs.

At the trial, the plaintiffs gave notice to the defendant that they should "not claim to recover anything from said Pease, on account of any alleged statements of said Pease, touching the value or quality or cost of the four hundred and seventy acre tract, or the ores, minerals and coal alleged to have been found thereon." The defendant thereupon asked the judge to rule that the declaration did not set forth any legal cause of action; but he declined so to rule.

In reference to extinguishing the claims of squatters, "it was agreed by the parties that the whole sum the defendant had received for 'that purpose' (in the language of the original indenture) was $2,442.85; that he had actually paid to squatters $1,650, namely, $800 paid to Waggy August 10, 1863, and $850 paid to King April 26, 1865, which was more than Pease had received for 'that purpose' up to January 16, 1864; that, on January 16, 1864, the plaintiffs gave the defendant their promissory note for $1,500 on sixty days, which was paid at maturity, and constitutes a part of said sum of $2,442.85, and on the same day the modification of the original agreement was made; and the plaintiffs contended that the defendant induced them to make this note by false and fraudulent representations," and upon this issue they introduced the deposition of William A. Abbott, one of their number, portions of whose testimony were as follows:

"About the time the original contract was made, Pease said he thought the squatters could be settled with for some one, two or three thousand dollars, but could better tell after going there and seeing them; that he would call for no more than he should ascertain would be needed; and that he would like $5,000 put in the contract as a nominal sum, and as a limit fixing the extent which we should be liable to pay to extinguish the claims by compromise; and as it would be needful for him to go at once to West Virginia, we agreed to pay $200 within a few days, as is stipulated in the contract."

"On January 16, 1864, at the time the modification of the contract was made, the note of $1,500 was not given to Pease as the consideration for such modification, but was given because he said he should need this sum to settle with squatters. About the time the note became payable, Pease called at the office of John S. Abbott and myself, and asked me if the note would be paid, stating that he should need it to pay the squatters the money he had promised them. I replied that the note would be paid; and after this I did pay the note at its maturity."

"Pease was in our office and asked for more money to settle with squatters, John S. Abbott being present. I told him in substance that I could settle with the squatters for less than he had already received. He then, without making reply,

left the office. As he was leaving, John S. Abbott stated to him that if he would satisfy us that more money than we had paid him was actually needed to settle with the squatters, he should have it. To this no reply was made. The letter of Pease dated June 11, 1864, with the draft accompanying it, was subsequently brought to the office by a messenger." This was the letter in which Pease requested these plaintiffs to accept his draft for $1,500, and on which he relied in his action against them, for evidence of notice and demand.

Abiel Abbott, another of the plaintiffs, testified that "he could not swear that the defendant made any representations as to the purpose for which he desired the $1,500 paid on said contract of January 16, 1864, but that he supposed it was to be paid in extinguishment of squatters' claims."

The defendant requested the judge to give the jury the following instructions: 1. "If the jury believe, on the whole testimony, that the parties to the contract of January 16, 1864, believed that the sum of $1,500 was paid with the impression, created by the phraseology of that contract or otherwise, that no part of the same was to be paid to the extinguishment of squatters' claims, then no part of it can be recovered back."

2. "There is no evidence on which the plaintiffs can recover in this action." 3. "If, at the time of the bringing of this suit, money was due Pease on the contract beyond the $5,000 which was to be paid to squatters, then Pease has the right to retain such sum plus the sum named in the second count, although there was no personal liability under the contract to pay more than was needed to settle with the squatters."

These requests were not complied with, except so far as appears from this statement of the instructions given: "The plaintiffs, to recover in their action, must prove by preponderance of evidence that they were induced to make payments of money to the defendant by representations made by him, that he had found that he could effect settlement with squatters, and required for that purpose the money paid to him, when in fact there were not any such squatters, or he had not found that he could effect settlement with them, or the moneys paid on his call and notice were not then or at all required for that purpose, the defendant having no right to call for more than was required for that purpose."

The jury returned a general verdict for the plaintiffs, with damages in the sum of $1,087.90; and the defendant alleged exceptions, which were argued at the same time with the exceptions taken by him on the second trial of the other case, and by the same counsel.

MORTON, J.

We are of opinion that none of the exceptions taken by the defendant can be sustained.

1. The plaintiffs' declaration contains three counts, two in tort and one in contract, alleged to be for the same cause of action. Gen. Sts. c. 129, sec. 2. At the trial the plaintiffs gave notice that they should "not claim to recover anything from said Pease on account of any alleged statements of said Pease touching the value or quality or cost of the four hundred and seventy acre tract, or the ores, minerals, and coal alleged to have been found thereon." The defendant thereupon asked the court to rule that the declaration did not set forth any legal cause of action. This the court correctly refused to do. If all the allegations referred to in the notice are stricken from the first count, we think it still sets forth a legal cause of action. But this is not material, in this connection, because the third count in contract, clearly sets forth a good cause of action, and the plaintiffs would be entitled to recover upon it if the allegations are proved. This exception therefore must be overruled.

2. The defendant asked the court to rule that there was no evidence to support the allegations of the declaration. This request was properly refused. The defendant contends that it does not sufficiently appear that the plaintiffs paid the money, relying on the representations made; and that they have failed to show that the representations made were false. But William A. Abbott, one of the plaintiffs, testified that the payments were made by them because of representations made by Pease that he needed the money to extinguish squatters' claims; and the facts admitted show that the whole amount received by Pease was not needed or used for that purpose. It is not within our province to judge of the weight or sufficiency of evidence. There was some evidence upon all the material al-

legations of the declaration, and the court rightly submitted it to the jury.

3. The defendant requested the court to instruct the jury that if they believed on the whole testimony, "that the parties to the contract of January 16, 1864, believed that the sum of $1,500 was paid with the impression, created by the phraseology of that contract or otherwise, that no part of the same was to be paid to the extinguishment of squatters' claims, then no part of it can be recovered back." The essential question involved in this request is, whether the plaintiffs paid the $1,500 for the purpose of extinguishing the claims of squatters. This question the court submitted to the jury under proper instructions. Under these instructions the jury must have found that the plaintiffs made payments to the defendant for the purpose of extinguishing such claims, and were induced to do so by his representations that such payments were required by him for that purpose. These instructions were adapted to the evidence and sufficient; and no exception lies to the refusal of the court to adopt the language of the prayer.

4. The defendant also requested the court to instruct the jury that, "if, at the time of the bringing of this suit money was due Pease on the contract beyond the $5,000 which was to be paid to squatters, then Pease has the right to retain such sum, plus the sum named in the second count, although there was no personal liability under the contract to pay more than was needed to settle with the squatters." The contract provides that the plaintiffs are not to incur any personal liability beyond the sums necessary to settle with squatters, but the defendant is to look to the land for security for all sums beyond that. No money beyond the sum needed to settle with squatters was due and payable to Pease under the contract. If by fraudulent representations he induced the plaintiffs to pay him more, the law will not allow him to retain it. His fraud can not enlarge the liability of the plaintiffs. The instruction requested was properly refused.

5. The defendant excepted to the admission of the testimony of Abiel Abbott to the effect that he supposed the $1,500 was to be paid in extinguishment of squatters' claims. We think this testimony was admissible. One of the issues

which the plaintiffs were required to maintain was, that they were induced to pay this sum by false representations by Pease that he needed it for the purpose of settling with squatters, and that they did pay it for that purpose. The defendant contended that when the payment was made the plaintiffs did not understand that it was to be used for that purpose, but that it was paid to him as the consideration of the modification of the contract made January 16, 1864. The statement of Abiel Abbott objected to was equivalent to a statement that he understood the payment made by him was for the purpose of settling with squatters, and bore directly on this issue.

There were several other questions raised in this bill of exceptions, but as the defendants' counsel did not press them at the argument, we regard them as waived.

Exceptions overruled.

THE RANDOLPH IRON COMPANY v. ELLIOTT.

(34 N. J. L. 184. Supreme Court, 1870.)

Second purchase of same ore. C. contracted with E. in March to deliver 1,000 tons of ore at a future date; before the delivery C. and his co-owners sold the ore to R., who delivered the ore to E., who paid C. therefor. The evidence showed that E. knew that R. was the owner of the ore at the time of the delivery thereof. *Held*, that R. could recover the price of the ore from E., notwithstanding his payment to C.

A contract for the future delivery of ore vests no title in the ore in the vendee until it is set apart.

Want of privity. If A purchase ore of B; and C, without the knowledge or consent of A, delivers his ore in fulfillment of the contract of B, the relation of vendor and purchaser does not exist between A and C.

Waiver of Tort. In such case, after demand and refusal, or actual conversion, trover will lie; or, after sale of the ore by A, the *tort* may be waived, and *assumpsit* maintained by C.

Action on the case to recover the price of iron ore. The plaintiffs had judgment in the court below.

On rule to show cause.

H. C. PITNEY, for plaintiffs.

NEIGHBOR and VANATTA, for defendant.

VAN SYCKEL, J.

This is an action of *assumpsit* to recover the price of eight boat loads of iron ore, which the plaintiffs allege they sold and delivered to the defendant.

The defendant admits that he received the ore, but sets up in defense that he purchased it in March, or early in April, 1867, of the then joint owners of the mine from which it was raised, through Joseph C. Chandler, one of their number, and not of the plaintiffs under the alleged contract of April 30th or May 1st, 1867, and that he is therefore not bound to account to the plaintiffs for it.

The Randolph Iron Company was organized on the 30th of April, 1867; the first boat load of ore was shipped on the 15th of May, 1867, and the last on the 11th of the following June, the principal part of it having been mined in May.

If, as the defendant insists, the title to this ore passed to him in the latter part of March, this action will not lie.

The defendant's title rests upon the alleged sale by Chandler, as one of the joint owners of the mine. That was a contract for the future delivery of one thousand tons of ore, but the ore agreed to be sold was not set apart, and therefore no title to it could pass under that agreement. All that the defendant could acquire by his stipulation with Chandler was a right of action against the associates for breach of the engagement to deliver the ore; he could not maintain trover or replevin against any subsequent purchaser of the ore from the associates.

The subsequent sale and delivery by the joint owners to the corporation of all their ore and mines, perfected a title in the plaintiffs which could not be divested without their consent.

Herrick, the president of the company, testifies very distinctly, that on the 30th of April, 1867, after the organization was consummated, the directors told Chandler to say to Elliott that he could have one thousand tons of ore at $5 per ton, cash on delivery, and that Chandler had no other or

greater authority in the premises than to carry this message to the defendant.

If Chandler induced the defendant to believe that this was the ore of the joint owners which he was delivering in fulfillment of his March agreement, although he thereby acquired no title to the ore, an action will not lie against him as purchaser.

An action of *indebitatus assumpsit* can never be maintained, unless upon a contract expressly made or implied in law. If the contract was as defendant states it, there was no express contract with the plaintiffs, nor could one be implied in law.

If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them, or if a person takes up wares from a tradesman without any agreement as to price, the law implies a promise to pay their real value. But if in this case, the defendant purchased ore of Chandler, and the company, without his knowledge or consent delivered him their own ore, the relation of vendor and purchaser does not exist between them.

After demand of the ore and refusal to return it or after actual conversion, trover would lie; or, after sale of the ore by defendant, the tort might be waived and *assumpsit* maintained.

There was no demand for the return of the ore, nor actual conversion and sale proved, and, therefore it must appear from the case that the defendant knew, when he received the ore, that it belonged to the plaintiffs.

Herrick testifies that in July the defendant made a demand upon the company to complete the delivery of one thousand tons, thereby recognizing the plaintiffs as the party contracted with; and Elliott himself admits that after Tretheway presented him a bill from the company for part of the ore, he received two boat loads.

The receipt of Chandler offered in evidence by the defendant is pertinent and in these words:

"May 6, 1867, received from Alex. Elliott, two thousand dollars on account of one thousand tons of ore to be delivered by Randolph Iron Co. JOS. C. CHANDLER."

From this evidence the jury were justified in finding that the contract was made between the plaintiffs and the defendant.

It was not within the authority given to Chandler to receive payment for the ore, and, therefore, the defendant's obligation to the plaintiffs is not discharged by payment to Chandler.

The rule to show cause must be discharged.

The Chief Justice, and DEPUE and WOODHULL, Justices, concurred.

CHENEY v. BARBER.

(1 Colorado, 256. Supreme Court, 1871.)

Conditional note—Time—Construction. An instrument was as follows: "Four months after date, for valued received, we jointly and severally promise to pay J. E. Barber or order $600" (*signatures.*) "In consideration of the above sum being without interest, we promise and agree that, should Wm. S. Rockwell, one of the signers hereto, effect a sale at the East or elsewhere of certain mining property on the Bobtail lode, and receive his pay therefor, then we will pay an additional $600" (*signatures.*) *Held*, that the above constituted two several contracts, the first of which might have been sued upon at maturity without reference to the second. *Held, also*, that to recover on the second, plaintiff must prove a sale of the premises intended in the agreement, such sale being a condition precedent, but that such sale was not limited to the period in which the note matured.

Rule as to admission of altered instruments. Where an alteration is such as to defeat the tenor of an instrument, it must be explained before it is allowed in evidence. In other cases, it goes to the jury without such proof.

Appeal from the District Court, Gilpin County.

W. S. & L. C. ROCKWELL, for appellant.

JOHNSON & TELLER, for appellee.

BELFORD, J.

This was an action of *assumpsit*, founded on the following note and agreement in writing:

"Four months after date, for value received, we jointly and

[1] S. C. 2 M. R. 692

severally promise to pay J. E. Barber or order, $600." Signed, Wm. S. Rockwell, Hazen Cheney, October 3, 1868.

"In consideration of the above sum being without interest we promise and agree that should Wm. S. Rockwell, one of the signers hereto, effect a sale at the East or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, then we will pay an additional $600." Signed, William S. Rockwell, Hazen Cheney. [seal.]

It is alleged in the complaint that on the 3d day of October, 1863, the plaintiff Barber, together with certain other parties, were the owners of certain mining property situated in Gilpin county, and known and described as the east sixty-six and (⅔) two thirds feet of claim number one, east, and the west twenty feet of claim number two, east, on the Bobtail lode. That on the day aforesaid, William S. Rockwell applied to the plaintiff for a power of attorney from him, authorizing Rockwell to negotiate a sale of the interest of the plaintiff in said property, and also, at the same time, applied to plaintiff for the loan of $600 in money for his own benefit. That thereupon it was agreed between Rockwell and Barber that the plaintiff would loan and advance to Rockwell the sum of $600, and also empower him to sell and convey the interest of the plaintiff in the property above described, on the condition that Rockwell and Cheney should make a joint and several promissory note to the plaintiff (being the one above set forth), and payable four months after date, for the sum of $600, and that said defendants, Rockwell and Cheney, would further execute and deliver to plaintiff an agreement in writing (being the one above set forth); that upon the sale of said property they would pay the plaintiff an additional sum of $600 to that mentioned in said note. It is further alleged that Rockwell and Cheney did thereupon execute said note, and at the same time and place make their certain agreement in writing, whereupon the said plaintiff duly empowered the said Rockwell to sell and convey the said property above described and to execute a deed therefor. And the plaintiff further avers that afterward, to wit, on the 31st day of March, 1864, Rockwell did sell and convey the same identical property referred to and mentioned in the written agreement above set forth, and received the pay therefor. A trial was had by the court,

a finding for the plaintiff, and judgment for the sum of $1,500.

The plaintiff, to maintain his action, offered in evidence the note and agreement, to the introduction of which the defendant objected "because said note and agreement have been altered by substituting the name of a different payee, and that the date of the said note has been changed since the same was executed," which objections were overruled by the court; and this is the first error assigned. We have no data before us by which the tenability of these objections can be determined, there is no evidence before us, that these objections urged by counsel existed; in fact, the execution of the papers is admitted, and we are asked to conclude that the instruments offered in evidence were altered upon the simple ground that the counsel so stated when they were offered in evidence. Had the originals been attached to the bill of exceptions, we might derive some light from an inspection, but this is denied us; neither the originals, nor any evidence showing the alleged alteration, have reached this court. The general rule is, that the material alteration of an instrument, made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be enforced renders it void. The question of alteration is a question of fact. The true rule in regard to the burden of proof is, that when the alteration is of such a character as to defeat entirely its operation for any purpose, as in the case of an erasure of the signature of a deed or other instrument, so that, admitting all to be true that appears upon the instrument when produced it would be void in law, it should be explained in the first instance before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury upon the ordinary proof of execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is, that it was made before or at the execution of the instrument: *Stoner* v. *Ellis*, 6 Ind. 152. It nowhere appears that any proof was offered, tending to show that any alterations were made in the instruments, and in the absence of all

evidence on the subject, we can not say that the action of the court in admitting these instruments was erroneous.

It is claimed by the appellant that the contract sued on is an entirety in law; that it contains but one agreement as to payment and time of payment, the latter being four months after date, the amount to be paid four months after date to be either $600 or $1,200, depending on the happening of an event, being the sale of certain mining property. It is very clear that the first instrument sued on is a contract to pay $600 four months after date. This payment depends on no contingency and hinges on no condition. It is an absolute promise to pay, and, at maturity, the plaintiff might have instituted legal proceedings to enforce its collection, omitting at the same time any mention or notice of the contract which immediately followed it. In the second contract it is stipulated that, as no interest has been charged for the loan of the sum secured by the promissory note, Rockwell and Cheney will pay $600 more to Barber, should Rockwell succeed in selling the mining property which Barber authorized him to sell. We can not agree with the appellant in his theory that the obligation to pay the additional $600 depended upon the sale of this property within four months, or during the time intervening between the execution and maturity of the note. The contingency upon which this second $600 became payable was the selling of the property. When a sale was effected and the money therefor received by Rockwell, then his promise ripened into an absolute liability. There nowhere appears in this second contract any limit as to the time when the sale was to be made, and to give it the construction claimed by the appellant, we must interpolate into the body of the contract words which the parties to it did not deem fit to incorporate. In other words we must make a new contract for them. This clearly is not the province of a court. To construe contracts, not make new ones, is our duty.

We are, therefore, of the opinion that, upon a sale being made, Rockwell and Cheney became liable for the additional $600.

It is further contended by the appellant that there is no evidence showing that a sale was made by Rockwell. It will be observed that the contract fails to describe specifically the

property to be sold. It was on the Bobtail lode, but what particular portion of it?

To entitle the plaintiff to recover, he must show that the property, concerning which the contract was made, was sold by Rockwell. To prove a sale, he introduced in evidence a deed made by Rockwell, as attorney in fact of Barber and others, to George A. Hoyt. Conceding that this deed was properly admitted in evidence, there is nothing in the record showing that the land described in the deed was the same about which this contract was made. If left to enter the domain of inferences, we might conclude that the property was the same, but the plaintiff, to recover, must rely on something better than inferences. It was in his power to prove this fact, and he should have done so. The testimony of Lyon throws no light on this branch of the subject, and the statement in Rockwell's letter is entirely too ambiguous to be relied upon with safety. From the careful examination we have given the evidence, we are forced to the conclusion that it is not sufficient to prove a sale of the property about which the contract was made.

This cause is, therefore, reversed and remanded for a new trial, at the costs of the appellant.

Reversed.

BALDWIN ET AL. v. THE UNITED STATES TELEGRAPH COMPANY.

(45 New York, 744; 6 American Reports, 165. Court of Appeals, 1871.)

Connecting telegraph lines—Partnership. The fact that two telegraph companies have co-terminal lines, and that one of them, as required by law, received messages from the other for transmission over its lines does not render them partners nor mutual agents, and each, in the absence of a special agreement, will be liable for its own acts, but not for the acts or defaults of the other.

Measure of damages. The defendant having received a message for transmission over its lines, without notice that extraordinary care or speed in its dispatch or delivery was important, will not be held liable for the special damages resulting from a delay in delivery or mistake in the message, but only for natural and ordinary damages, the special damages for the non-delivery of the message being too remote.

Appeal from the judgment of the general term of the Supreme Court in the Fourth Judicial District, affirming the judgment of the circuit in favor of the plaintiffs, Baldwin et al., for $1,200 damages upon an action for delay in the delivery of a telegram.

On November 16, 1864, the plaintiffs delivered to the operator of the United States Branch Telegraph Company at Ogdensburg, the following dispatch: "Telegraph me at Rochester what that well is doing," signed by F. B. Baldwin, and addressed to Erie Darling, at Rouseville, Pa., and paid for the transmission to its destination. The telegraph line of this company extended only to Syracuse, where it delivered the message to the defendant company which transmitted it to Rouseville. There was evidence to show that the message was delivered by the defendant at Darling's residence, but addressed to "E. R. Cooley," so that it was not received or opened by Darling for several days.

Notwithstanding defendant's objection, evidence was also admitted that plaintiffs told the operator at Ogdensburg, at the time of handing him the telegram, that they had received an offer of $3,800 for their oil wells and wanted to get an answer from Rouseville to prevent selling at that price if there were more favorable prospects in regard to the property. Baldwin in the meantime went to Rochester, and not hearing from Darling for several days, finally sold the property for the $3,800. A few minutes after the sale was effected, Baldwin received a telegram from Darling *via* Ogdensburg: "Well flowing eighty barrels. New well pumping twenty-five barrels. Can sell your interest for five thousand dollars. Telegraph me refusal for ten days. Have Perry transfer to me." Evidence was also given, tending to prove the market value of the property at $6,000.

The judge at circuit ordered a verdict for plaintiff for $1,200, and judgment upon this verdict being affirmed at the general term, this appeal was taken by defendants.

GROSVENOR P. LOWERY, for appellants.

E. C. JAMES, for respondents.

ALLEN, J.

Several questions of more or less importance are presented by the appeal in this action, bringing up as it does, not only the trial and the decisions and rulings therein, but the decisions and judgments of the Supreme Court upon the demurrers to several of the answers of the defendant; but in the view we take of the case, it is necessary to consider but one, as that is decisive of the action, except as it may possibly be maintained for the recovery of nominal damages. The defendant was held liable to special damages, largely in excess of any that would ordinarily be in the contemplation of the parties, or would ordinarily and naturally result from the neglect of duty imputed to the defendant, upon the ground that the Ogdensburg company, or its agent and operator at Ogdensburg, was the agent of the defendant in the receipt of the message, and that the latter was chargeable with and affected by knowledge and information possessed by or communicated to the supposed agent, touching the service to be performed, the object and purpose of the message, and the consequences which might result from the non-delivery of it. The defendant has been held liable as upon a special contract, stipulating the damages in case of failure to perform the required service, at the difference between the actual value of the property contemplated to be sold and the price then offered, and as if the defendant had expressly agreed that, upon a failure to deliver the message to the person to whom it was addressed without delay, the plaintiffs might sell their property at a specified price, without making further effort to ascertain its value, and the defendants would, as the measure of their liability, pay the loss resulting from a sale at less than the actual value, and this upon receipt of the comparatively insignificant sum fixed and paid for sending ordinary messages; that is, upon payment of the usual fee for the service, without compensation for the extraordinary care and diligence required, or the risk and responsibility incurred, and without knowledge or thought by any one, so far as appears, of the possible extent of such a liability. No ordinary agent and servant could make such a contract in behalf of the company represented or served by him. It would not be within the ordinary scope of his duties, and it would require some evidence of authority or usage of the corporation to sanction and

uphold such an agreement as the agreement of the company and bind it. It is not intended to deny that a corporation is bound by knowledge of and notice to its agent touching the duties of his agency, and that notice to the agent, while employed in the business intrusted to him, and connected with or relating to that business, is notice to the principal, and that the principal will be subjected to all the legitimate consequences of such notice, as if it had been given to him personally. Here, however, the principal has been held liable to damages other than such as result from mere notice of the situation of the parties and the property which was the subject of the message. But passing this question, there was no agency for the defendant, at Ogdensburg, proved upon the trial. The first connection of the defendant with the message was at Syracuse, and by receiving it from the agents of the Ogdensburg line, for transmission from Syracuse to Rouseville. Neither the Ogdensburg company nor the operator of that company at Ogdensburg was the agent of the defendant for any purpose.

It may be conceded, that when the defendant received the message from the other company at Syracuse, it assumed a duty, and came under a liability directly to the plaintiff, and for any omission or neglect of the duty then assumed the plaintiff's could maintain an action: *Leonard* v. *N. Y., etc., Tel. Co.* 41 N. Y. 544; *Squire* v. *W. U. T. Co.* 98 Mass. 232. There was no evidence of any business relation between the two telegraph companies. These lines were co-terminous, the one terminating and the other commencing at Syracuse, and the defendant, as required by law, received messages from the Ogdensburg company which had been received at Syracuse over the lines of the latter company, to be transmitted to places on the defendant's line. No partnership or mutual agency can be inferred from such terminal relations, and the business transactions resulting therefrom. The statute, under which the two companies became incorporated, required each to receive dispatches from the other, on payment of the usual charges, and to transmit the same: Laws of 1848, ch. 265, § 11; Laws of 1855, ch. 559.

A compliance with this act, or the rendering a service which would be a compliance, is not the slightest evidence of any

partnership or other business relation between them. It is like the case of several successive carriers of goods over an extended route, each, as occasion requires, receiving goods from the other for carriage. Each in the absence of evidence of a special agreement or arrangement, either with the owner of the goods or between each other, will be liable for his own acts, but not for the acts and defaults of the others: *Squire* v. *W. U. Tel. Co.*, *supra.*

The defendant received the message without notice or information of any fact indicating that extraordinary care or speed in its dispatch or delivery was important or expected, or that extraordinary or special damages would result from any neglect or want of care or accuracy in performing the service. The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received.

For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cypher or in an unknown tongue. It indicated nothing to put the defendant upon the alert or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purposes for which, it was made, and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract: *Cory* v.

Thames Iron Works, L. R. 3 Q. B. 181; *Leonard* v. *N. Y. A. & B. Tel. Co., supra; Messmore* v. *N. Y. Shot and Lead Co.*, 40 N. Y. 422; *Hadley* v. *Baxendale*, 9 Exch. 341; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232; *Griffin* v. *Colver*, 16 N. Y. 493; *Landsberger* v. *Mag. Tel. Co.*, 32 Barb. 530. In *Leonard* v. *N. Y., etc., Tel. Co., Squire* v. *W. U. Tel. Co., supra*, and *U. S. Tel. Co.* v. *Wenger*, 55 Penn. R. 262, the object of the messages and the purposes of the persons sending them were clearly indicated by the messages themselves, and the damages awarded were such as necessarily and ordinarily attend a failure of the purpose, and would naturally result from the neglect of the telegraph company to perform its duty. Assuming that the answers of the defendant, which had been held bad upon demurrer, and upon which judgment had been given for the plaintiff, were before the court upon the trial so as to make the statements evidence as admissions, a *prima facie* case of negligence was made against the defendant. The message had been delivered to the company at Syracuse, properly addressed and directed, and it was delivered at the place of its destination from the office of the defendant misdirected and addressed to a different name, so that it did not reach the person for whom it was intended. This, unexplained, would have authorized a verdict for the plaintiff.

While telegraph companies are not insurers and do not guaranty the delivery of all messages with entire accuracy, and against all contingencies, they do undertake for ordinary care and diligence in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted and the current broken without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing it, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These, and risks of the like character, are upon the person sending the message unless he elects to comply with the terms of the company, and have the dispatch

repeated by which certain risks are guarded against and errors prevented or insured against. But an error in transcribing the direction, and a consequent misdelivery, are *prima facie* evidence of neglect and want of care in the operator, and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. For the purposes of this appeal it is assumed but not decided, that this message was not subject to the terms and conditions ordinarily attached to the receipt of messages for transmission, but that the defendant is subject to all the liability which legally results from a receipt of a message and a naked agreement to transmit the same to its destination for a reasonable compensation paid therefor.

If the terms and conditions ordinarily imposed were a part of the contract, the question would arise whether the defendant would not be protected against liability for the "error and delay" in the delivery of this dispatch. See *MacAndrew* v. *Electric Tel. Co.*, 17 C. B. 3; *Ellis* v. *Am. Tel. Co.*, 13 Allen, 226.

The dispatch, not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale (or even a stranger might ask for purposes entirely foreign to the property itself), it is evident that whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant. The plaintiffs have lost the money paid the Ogdensburg company, and are entitled to recover it, but the sale of their property at a loss was not in the contemplation of the parties, and the damages resulting therefrom were not the natural and ordinary damages resulting from the breach of duty by the defendants.

Indeed, I doubt if under any construction of the contract, or in any view of the rights and obligations of the parties, such damages could be recovered by the plaintiffs as the result of the non-delivery of the message. They are quite too remote, and depend upon too many contingencies. Had the message been received, the agent might or might not have answered it, and what the answer would have been can not certainly be known; the answer might or might not have been received by the plaintiffs at Rochester, and if received it is conjectural what might have been the action of the plaintiffs thereon. Again, the sale without an attempt to obtain further information was the voluntary act of the plaintiffs neither caused nor encouraged by the act or default of the defendant. The mere assertion of the operator at Ogdensburg, had he been the agent of the defendant, that they would sell if no answer was received to the message, did not relieve them of the duty resting upon all persons for whose losses others may be liable to respond, to take all reasonable measures to avoid loss or to diminish the damages that may occur. This principle is applicable to all who may claim indemnity from others for losses, either upon express contract or for torts: *Hamilton* v. *McPherson*, 28 N. Y. 72; *Milton* v. *Hudson River St. B. Co.*, 37 Id. 210; *Wilson* v. *Newport Dock Co.*, 4 H. & C. 232. The defendant offered evidence tending to prove that the plaintiffs might, before the sale of the property, have obtained the desired information which it is claimed would have prevented its consummation and avoided all loss, and it should have been received, as it would have constituted a perfect defense.

It can not be claimed that there was any valid contract of the defendant by which the plaintiffs were insured against the consequence of their own acts or neglect.

The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concur, except RAPALLO, J., not present, and FOLGER, J., not voting.

Judgment reversed.

RICHARDS v. SCHLEGELMICH.

(65 North Carolina, 150. Supreme Court, 1871.)

[1] **Payment dependent on condition of mine.** The meaning of a contract reading "Twelve months from date, with interest from date, I promise to pay William Richards $6,662 in the event the Rhodes gold mine continues to prove, at the expiration of said time, a good gold mine" is, that the payment is due, if the mine continues at the end of the year as good a mine as it was at the beginning.

Surrounding circumstances. In cases of construction facts existing at the time words are used, may be proved as a key to their meaning.

This was a civil action tried before his Honor, LOGAN, J., at the spring term, 1870, of the Superior Court for Gaston County. The complaint was founded upon a promissory note for the payment of money, in the following words:

Twelve months after date, with interest from date, I promise to pay William Richards six thousand, six hundred and sixty-two dollars, in the event the Rhodes gold mine continues to prove, at the expiration of said time, a good gold mine.

(Signed,) FRED. SCHLEGELMICH.

March 16, 1868.

The defendant alleged that the said "gold mine had not continued to prove, nor was it at the expiration of the time of payment, a good gold mine, nor is it so at this time." It was in evidence that the mine had been previously worked, and that the defendant had possession of it and worked it during the time specified in the note. Testimony was given on both sides as to the quality of the mine, and as to how much per ton the ores yielded. His Honor charged the jury that according to the terms specified in the note, there was a condition precedent, and it was for the plaintiff to satisfy them of its performance before he would be entitled to recover; that if from the evidence they believe he had proved the mine to be a good gold mine he would be entitled to recover, otherwise they should find for the defendant. There was a verdict and judgment for the defendant, and the plaintiff appealed.

GUION & HOKE, for the plaintiff.

[1] *Benninger* v. *Hankee*, 3 M. R. 18.

BYNUM & J. H. WILSON, for defendant.

PEARSON, C. J.

It was the duty of the judge to put a construction upon the instrument sued on. His Honor performed this duty in part, by holding, "there was a condition precedent, and it was incumbent on the plaintiff to prove its performance." He then leaves it to the jury to find whether it was or was not a good gold mine at the time the note was payable. From this we assume his opinion to be, that by the true construction of the instrument, it was for the plaintiff to satisfy the jury, that it was a good gold mine, according to the estimation of miners, at the time referred to; in other words, that the meaning of the instrument was, the defendant is not to pay unless the mine proves to be a good gold mine at the end of the year, treating the word "continues" as surplusage, and giving to it no force; so as in effect, to make the plaintiff undertake to guaranty that the mine at the end of the year would prove to be a good one, absolutely, and without reference to any other consideration, save what is a good gold mine according to the estimation of miners.

This court is of opinion that such is not the meaning of the instrument, having regard to well-settled rules of construction, *e. g.:* "Every word of an instrument should (if possible) be made to have some operation." "Words are to be taken most strongly against the party using them." For self-interest prompts a man to select words that do not run to his prejudice, outside of his own intention.

The mine was not a new one, but had been previously opened and worked by other persons; the plaintiff and defendant both had access to this means of information, and the words, "continues to prove a good gold mine at the end of twelve months," amount to this; the mine has proved to be a good gold mine so far, in the estimation of the parties. Now in the event it continues to prove a good gold mine at the end of the year, the price is to be paid, otherwise not, thus making the plaintiff guaranty that the mine will not turn out to be any less good at the end than it was at the beginning; so that should the vein give out, or prove, on being fol-

lowed, of less thickness, or the ore be of less richness than it has now proved, the defendant is not to pay for it.

This construction gives full force to the word "continues" and to the word "proves" by having reference to the fact that the mine had been previously worked. It is well settled that in putting a construction, facts existing at the time to which the words used point, may be proved "as a key to the meaning." The condition of a testator's family and estate may be proved to aid in arriving at his meaning. The mischief which a statute is intended to remedy may be taken into consideration by the court, in order to fix the meaning of the words used, so as to correct the mischief, and avoid carrying the operation of a statute too far, or stopping short of the mischief. In our case the word "continues" would not have been inserted, unless the parties intended to convey some meaning by the use of it. What that meaning was, is made clear by the fact that the mine had been previously worked, and as miners say "tested." But for this fact the word "continues" would be senseless and unmeaning, and, of course, would not have been used; connected with this fact, it is pertinent and controlling. To give effect to it, his Honor ought to have submitted to the jury the question: Did the mine continue to be as good a mine at the end of the year as it was at the beginning, or did it fall off and prove to be worse to such a degree as not to be worth working?

There is error.

Venire de novo.

PER CURIAM.

GRANT v. LAW.

(29 Wisconsin, 99. Supreme Court, 1871.)

Practice—Decree for rescission. In an action in equity for the rescission of a contract for the sale of land on the ground of fraud, and also to have a mortgage and notes for purchase money released and canceled, a judgment which does not provide for an absolute recission of the con-

[1] See *Law* v. *Grant*, 37 Wis. 548, *Post* FRAUD.

tract, but treats it as valid in part, and void in part, and cancels such notes and mortgage, permitting the purchaser to retain the land, can not be sustained.

Rescission—Fraud. A party can not disaffirm a contract in part on the ground of fraud, and affirm it as to the residue. He must make his election either to rescind *in toto* by restoring all that he has obtained by it, in which case he may recover back what he has paid on it, or he may retain the property and sue for damages for the fraud. The rule is the same in respect to both personal and real estate.

Appeal from the Circuit Court for La Fayette County.

The complaint states that the plaintiff purchased of the defendant four hundred acres of land in La Fayette county, for the consideration of $40,000, paid $15,000 in cash, and gave notes and a mortgage for the balance, three of which for the sum of $5,000 each and interest at ten per cent., were still outstanding and belonged to defendant. The plaintiff then alleged that, to induce him to purchase, the defendant by his agent, R. S. Law, represented among other things, that such land was very rich and valuable mineral ground, and contained large quantities of lead ore, and that a test had been made and lead ore discovered; that he was induced by his belief in such representations to make the purchase and pay the price; that they were knowingly, falsely and fraudulently made for the fraudulent purpose of inducing him to purchase at that price; that in fact no lead ore or mineral of any value had been found, and there were, at the time the representations were made, no perceptible indications to warrant the conclusion that the land was mineral land; that he had expended a large amount of money and made a thorough test, and clearly established the fact that it was not; and that he had tendered to the defendant a deed of the premises and requested him to refund the money paid, which was refused.

He therefore asks judgment for $60,000 damages, and that the defendant be required to release and discharge such mortgage and deliver up said three notes to be canceled; and that, until final judgment, he may be restrained from disposing thereof.

The defendant, by answer among other things, expressly denies all the fraudulent representations alleged; or that the plaintiff was induced thereby to purchase; or that the plaint-

iff had been defrauded or damaged in any sum; or that R. S. Law, the person alleged to have made such representations, was his agent; or that the plaintiff had made a thorough test of the land as to its being mineral land; but alleges that the land was good agricultural land, having on it valuable improvements, and was worth $40,000; that the negotiation for the purchase was made between the plaintiff and defendant personally, and the plaintiff expressly stated at the time that he relied upon his own judgment about the land; and asks that the injunction may be dissolved and judgment rendered in his favor for the interest due on the outstanding notes.

At the trial, the court without the consent of the parties, submitted to a jury certain questions of fact, and they having found, in answer to the first question, that the defendant did induce the plaintiff to purchase the tracts of land described in his complaint, by means of the fraudulent and false representations alleged therein; and the court having adopted such finding, and having found the further facts alleged in the complaint, and that the plaintiff had suffered loss and damage to the amount of four thousand dollars, expended in searching for mineral, and $27,000, the difference between the value of the land as found by the jury, and the price agreed to be paid; and that the plaintiff had remitted all damages over and above the amount of the unpaid notes and interest; it found as conclusions of law that the plaintiff was entitled to recover the amount of such notes and interest, and to have judgment; that the defendant surrender the notes and discharge the mortgage in lieu of a judgment for said amount of damages, and that he recover his costs and expenses, and that the temporary injunctional order before granted be made perpetual.

From the judgment entered in accordance with such findings, the defendant appealed.

FINCHES, LYNDE & MILLER, for appellant.

ORTON & OSBORN and M. M. COTHREN, for respondent.

COLE, J.

It is objected that the judgment in this case proceeds upon an erroneous basis, and can not stand; that it gives the plaint-

iff the title to the land, and yet deprives the vendor of the unpaid purchase money. It is insisted that, if the plaintiff seeks to rescind the contract on account of fraud practiced upon him by the defendant at the time of sale, then he must rescind *in toto*, and can not rescind in part and affirm in part. The complaint demands a judgment for sixty thousand dollars' damages sustained in consequence of the fraud and misrepresentations made in regard to the land being rich and valuable mineral ground, containing large quantities of lead ore, etc., and also that the mortgage and three unpaid promissory notes be released and canceled. The circuit court held that the plaintiff was entitled, in lieu of a judgment for the amount of damages, that the defendant surrender and deliver up these notes and release the mortgage of record, retaining of course the real estate which he had purchased. It is not claimed by any one that this is an action at law for fraud and deceit, where the recovery is a judgment in form for so many dollars according to the proof of the amount of damages sustained by the plaintiff. This, evidently, is not the theory of the action, and such is not the relief granted by the judgment. But this is obviously an action in equity for a rescission of the contract on the ground of fraud. It is like the case of *Miner* v. *Medbury*, 6 Wis. 295, and cases of that character.

And the difficulty, therefore, which meets us at the outset, and which appears to be insurmountable, is that the judgment does not provide for an absolute rescission of the contract but treats it as valid in part and void in part. The plaintiff is permitted to hold on to the real estate, and at the same time have the notes and mortgage executed to secure the payment of a portion of the purchase money, canceled for fraud. It seems to us that this can not be done without a violation of well established principles. We do not wish to be understood as holding that, upon the evidence, the plaintiff would be entitled to a rescission of the contract and a recovery of the amount paid, but merely that he can not affirm and disaffirm the contract at the same time. This is well settled: *Weed* v. *Page*, 7 Wis. 503; *Hollenbeck* v. *Shoyer*, 16 do. 499; *Costigan* v. *Hawkins*, 22 Wis. 74; *Akerly* v. *Vilas*, 21 do. 88; *Weeks* v. *Robie*, 42 N. H. 316; *Pearsoll* v. *Chapin*, 44 Penn. State R. 9; *Barton* v. *Beer*, 35 Barb. 78, are a few of the

very many cases which might be cited in support of this doctrine.

The law upon this subject is very clearly laid down by BEARDSLEY, J., in *Masson* v. *Bovet*, 1 Denio, 69–74, as follows: "The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle. He can not hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto* if at all." And the rule is the same in respect to both real and personal estate. The plaintiff must make his election, either to rescind the contract by restoring all that he has obtained by it, when he may recover of the defrauding party what he has paid upon it, or he may retain the real estate and sue for damages sustained by reason of the alleged fraud. But he can not affirm so much of the contract as may be advantageous to him and rescind as to the residue. And this seems to be what was really done by the judgment of the court below.

It results from these views that the judgment of the circuit court must be reversed and the cause remanded for further proceedings.

BY THE COURT.—*So ordered.*

GORDON v. SWAN ET AL.

(43 California, 564. Supreme Court, 1872.)

Stockholders acting for corporation. The stockholders of a mining corporation agreed in writing with S. & K., the defendants, to assign their stock in trust, to be conveyed to S. & K., provided they paid to the trustee a certain sum of money, etc., for the use of the stockholders. A resolution of the board of directors of the corporation also authorized the delivery of the possession of the property to the defendants, and a conveyance to them when they should have fulfilled their contract with the stockholders. *Held*, that it was substantially as if the contract had been made with the corporation instead of the stockholders.

Conditional purchase of mine—Forfeiture. The contract further recited that S. & K. are desirous "of eventually making a purchase of the shares of stock * * and of the mine, if the tests which they shall cause to be made prove satisfactory." *Held*, that S. & K., by their failure to pay the first installment of the purchase money, lost their

privilege of purchase and forfeited their improvements, but did not become liable to pay the consideration money, which, by a reasonable construction of the contract, they were only to pay if they elected to purchase.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

The contract referred to in the opinion was signed by stockholders who owned about 960 shares of the "Cosumnes Copper Mining Co.," the whole stock being 1,000 shares. Plaintiff was the assignee of 91⅔ shares.

The demurrer to the complaint was sustained by the court below and final judgment was rendered for defendants.

Plaintiff appealed.

C. A. TUTTLE, for appellant.

W. H. L. BARNES, for respondents.

By the Court, NILES, J.

The plaintiff sues as the assignee of Griffith & Muffley of their interest in a contract made between them and a number of other persons, stockholders of the "Cosumnes Copper Mining Company," of the one part, and the defendants of the other part. The complaint sets forth the contract *in hæc verba*, and the sufficiency of the complaint must be determined by an inspection of the instrument.

The contract recited that the corporation was the owner of a vein of copper ore; that the parties of the first part were stockholders in the corporation and desirous of selling their respective shares; that the parties of the second part (defendants) were "desirous of making certain improvements on the said mine, and erecting smelting works for the purpose of reducing the ores of said mine, and of eventually making a purchase of the shares of stock of the parties of the first part and of the mine, if the tests which they shall cause to be made prove satisfactory."

The stockholders upon their part, agreed that they would assign their stock to John Sime & Co., to be held by that firm "in trust, to re-assign and return the same to the parties of the first part if the parties of the second part fail to perform

their part of this agreement; and if the parties of the second part fulfill their part of this agreement, and pay the money agreed to be paid, then to assign and deliver said certificates of stock to the parties of the second part," etc.

The defendants, upon their part, agreed to immediately construct a road to the mine, and within a specified time erect a furnace and smelting works for the reduction of the ores.

They further agreed "to pay" * * * "to the parties of the first part, by paying the same to the said trustees for them, the sum of fifty thousand dollars at the end of six months from the time this agreement is signed and possession of the mine taken"; and, in similar terms, agreed to make two further payments of fifty thousand dollars each, at intervals of six months.

It was then provided that "if the parties of the second part fail to fulfill any of the agreements herein contained to be by them performed, they shall forfeit whatever improvements they may have made in and about the mine, and all moneys paid in accordance with this agreement, and all machinery connected therewith (except the said furnace and machinery connected therewith, and tools.)"

And in case of such failure the parties of the first part were "to take peaceable possession of said mine and all improvements, except as reserved, without any recourse at law."

A resolution of the board of directors of the corporation, which was also set forth in the complaint, authorized the delivery of possession of the property to the defendants, and a conveyance to them, when they should have fulfilled their contract with the stockholders, and should surrender up the stock held by Sime & Co. in trust.

Immediately after the execution of the contract, the stockholders transferred their stock to Sime & Co., and the defendants entered into possession of the mine, and erected a portion of the works required for testing the ore; but they failed to pay the first installment of fifty thousand dollars. Plaintiff sues to recover the proportion of this sum alleged to be due to him as assignee of Griffith & Muffley.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

In construing the contract, the first question naturally presented is, what was the consideration for the defendants' agreement to pay the sum of one hundred and fifty thousand dollars? The fifth clause of the contract which contains the agreement to pay does not specify any consideration for the payment; and, as a consideration is needed to uphold the promise, we must look for it without the clause which contains the promise only.

We think it is very evident that this amount was to form the consideration for the purchase of the stock, which, if purchased, would, by the action of the board of directors, result in a conveyance of the mine to the defendants. It was a device by which the defendants could acquire the title to the mine, and the stockholders could receive their several proportions of the purchase money directly, and without the trouble and delay of the proceedings for its distribution which the statute would otherwise require.

It can not be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. It was intended as the purchase money of the property itself, and it is substantially as if the contract had been made with the corporation instead of the stockholders.

The contract contains no obligation on the part of the defendants to purchase the stock. On the contrary, it seems to be clear, from the terms of the instrument, that the purchase should be at defendants' option. It recites that the defendants are desirous "of eventually making a purchase of the shares of stock * * * and of the mine, *if the tests which they shall cause to be made prove satisfactory.*" The trustees were to assign the stock to the defendants if they performed their part of the agreement—otherwise, to re-assign it to the stockholders. The contract provided for a peaceable repossession of the mine by the stockholders in case of defendants' failure to perform, and a forfeiture of all moneys paid or improvements made by them. It was one of a class of contracts, common among miners, by which the mine owner gives to another person the privilege of prospecting the mine for a certain time, and the option of pur-

chasing at a fixed price, or perfecting the improvements made by him. The defendants, by their failure to pay the first installment of the purchase money, exercised their choice, and so lost the privilege of purchase, and forfeited their improvements; but did not become liable for the amount, which by a reasonable construction of the instrument, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine.

Judgment affirmed.

BURTON v. WILKES.

(66 North Carolina, 604. Supreme Court, 1872.)

Charcoal contract—Dependent covenants. The stipulations contained in contract in these words: "A B contracts with C D to furnish at Long Creek Furnace from 500 to 1,000 bushels of coal daily at 6½ cents per bushel; C D to furnish the timber *gratis*, and advance to A B all the money weekly, necessary to pay off the wood choppers," are dependent, and if without fault on the part of the owner of the furnace, and without legal excuse, the quantity of coal agreed for is not delivered, the owner of the furnace may properly set up such failure by way of counter claim to an action for the price of the coal.

Charge overlooking the merits—Recoupment of loss to furnace. In an action on such contract which omits all, or any but indifferent reference, to the defense relied on, to wit: counter claim of failure to manufacture iron on account of non-delivery of coals, misses the points of the case, fails to enlighten the jury, and can not be sustained.

Memorandum to jury. A judge has no right to hand to the jury a memorandum of plaintiff's claim against the wish of the opposing party.

This was a civil action tried at Fall Term, 1871, of Lincoln Superior Court, before His Honor, Judge LOGAN, and a jury.

The plaintiff in his complaint alleged that he had made a contract with the defendant, who was running an iron furnace, in writing, in these words, viz.:

"Articles of agreement between H. W. Burton and Admiral Charles Wilkes.

"H. W. Burton contracts with Admiral Charles Wilkes to furnish, at Long Creek Furnace, from 500 to 1,000 bushels of coal daily, at 6½ cents per bushel, to be measured at the pit.

"Admiral Wilkes agrees to furnish the timber *gratis*, wherever he may see fit, reserving groves and fruit trees, and advance to H. W. Burton all the money, weekly, necessary to pay off the wood-choppers; coal to be paid for on delivery at the furnace.

"H. W. BURTON,
"CHARLES WILKES.

"Nov. 16, 1869."

And that about the 1st December, 1869, the defendant further agreed, without writing, that plaintiff should take certain wood of defendant's, already cut down, and make coal of it, and that the plaintiff should only receive, for coal made of this wood, five cents per bushel.

That when the written contract above stated was made, the defendant also agreed by word of mouth to take off the plaintiff's hands all the wood that might remain on plaintiff's hands when he ceased "coaling."

That under these several contracts, the plaintiff furnished the coal and wood to make coal as charged in an account exhibited with his complaint.

Defendant, by his answer, admitted the execution of the written contract, but alleged that the plaintiff had failed to fulfill his part thereof. That plaintiff had not delivered daily 500 bushels of coal on more than three days.

Defendant also admitted the contract of December 1, 1869, but denied the oral contract of Nov. 16, 1869.

Defendant alleged by way of counter-claim that plaintiff had agreed to furnish daily at least 500 bushels of coal, and failed to do so, whereby his furnace, which was of capacity sufficient to consume that amount of coal daily, became "banked up," and stopped, and defendant was thereby prevented from manufacturing as much iron as he would otherwise have done, and demanded by reason thereof, damages to the amount of three thousand dollars.

By way of reply to this counter-claim, the plaintiff alleged the 500 bushels of coal was not furnished daily, in consequence of the defendant's failure to pay the wood-choppers, or to pay for the coal on delivery.

The case was submitted to the jury with issues.

There was evidence in behalf of the plaintiff, tending to

show that after the written contract was signed, defendant agreed that if the furnace stopped he would pay for the wood left on hand, and that he wanted "coaling" to go on even if the furnace stopped.

It was also in evidence that the plaintiff stopped "coaling" because he was not advanced money weekly, to pay the wood-choppers, and that he had not the money to carry on the business. That after the plaintiff quit, he, at the instance of defendant, met the defendant's general business agent, one Alexander, and Alexander "took up" all the wood left on hand, by which is meant that he received it and marked it with a cross, as was the custom among choppers; that he also "took up" all the coal made and delivered; these being the main items in controversy in this action. It was also in evidence that the plaintiff had not delivered on any one day, 500 bushels of coal, or averaged that much per day, and that his reason for failing to do so was that he could not employ enough choppers for want of means. It was also in evidence, that it would require about three months in the country to get ready to make coal, in order to furnish as much as 500 bushels of coal daily; that thirty choppers were necessary; teams to haul, and time to "set" the pits, etc. There was also evidence that after the coaling ceased the defendant admitted the plaintiff's claim, as set up in this action, and did not set up any defense thereto, but on the contrary, let a silent partner have pig-iron in satisfaction, which was afterward given back on an express promise by defendant's general agent to pay the account in full.

It was in evidence on the part of the defendant, that his furnace had two "tuyeres," and that it required 500 bushels of coal daily to run both tuyeres; that if both tuyeres could have been run, the furnace would have yielded one and a half more tons of iron per day; and metal was then worth $30 to $40 per ton; that about Christmas, 1869, a cog broke in one of the blast-wheels; that it took ten days to repair it, and in the meantime the furnace was "banked up" to prevent combustion of material and chilling of the furnace; that after the blast-wheel was repaired there were only 500 bushels of coal on hand, and furnace did not start for eight days. The plaintiff's counsel insisted that the plaintiff was entitled to reason-

able time to begin delivering 500 bushels of coal daily, and that the plaintiff was prevented from doing so by the failure of the defendant to advance money to pay wood-choppers before such reasonable time elapsed, and that in the meantime if plaintiff furnished coal and defendant accepted and used it as it was stated on the account, the plaintiff was entitled to recover the value of it, and that defendant could not recover on his counter-claim because of his failure to pay wood-choppers, and because he did not aver readiness and ability, etc. Defendant's counsel insisted that the plaintiff could not recover on the written contract because he had not complied with its provisions; that unless he had delivered 500 bushels daily, he could not recover under the written contract; that as to the oral contract about the wood, there was a variance between the allegations and the proof, and as to the counter-claim that if the plaintiff's failure to deliver the 500 bushels of coal daily, injured plaintiff as stated, he was entitled to recover to the amount of damages thus sustained.

His Honor charged the jury, "that if the plaintiff's contract was not complied with, he could not recover on it, but that the law did not require impossibilities, and the plaintiff was entitled to reasonable time to prepare for executing it; that if the plaintiff was prevented, by the defendant's failure on his part, from furnishing the coal as provided for in the contract, he was nevertheless entitled to the value of the articles furnished and received by the defendant; that if after the work ceased any agreement was made for the payment between the parties, then plaintiff was entitled to recover accordingly." His Honor then handed to the jury a slip of paper in these words:

Plaintiff claims balance	$ 57.77
Wood and coal	560.39
Interest (left with jury)	64.90
Claim and interest	$683.06

To this, defendant excepted. The defendant's counsel then called the attention of his Honor to the circumstance that he had failed to charge upon the counter-claims, whereupon his Honor instructed the jury that "if the plaintiff failed to per-

form his contract, he could not recover, and if defendant failed, he could not recover."

Under these instructions the jury found a verdict for the plaintiff, assessing his damages at $683.06, and from the judgment rendered thereon, the defendant appealed.

SCHNECK & BAILEY, for the plaintiff.

Moved to dismiss the appeal because it did not appear that the undertaking of appeal had been filed in ten days. The court it seems began 23d day of October, 1871, and the appeal bond is dated — day of November, 1871, also because there was no justification; another undertaking of appeal was filed December 1, 1871, which only appears to be justified as to one of the sureties. This motion being denied they filed a brief which has been mislaid.

J. H. WILSON, for the defendant.

BOYDEN, J.

In this case the defendant was the owner of a furnace in the county of Gaston, which required five hundred bushels of coal daily, to run it to its full capacity, and the plaintiff agreed to deliver to the defendant daily at his furnace from 500 to 1,000 bushels of coal.

The plaintiff was to cut the wood on the defendant's land, burn the coal and deliver it, and the defendant was to furnish weekly, money to pay the wood-choppers, and to pay for the coal as it was delivered at the furnace. This contract was made in writing on the 16th day of November, 1869. There was no time fixed in this contract when the plaintiff should commence cutting wood or delivering the coal. There was a quantity of wood cut at the time the contract was made, how much does not appear, which the plaintiff was to use in making coal, but the coal made of this wood was to be delivered at a less price than that fixed in the contract. It does not appear that there was any complaint, that the plaintiff did not commence cutting wood and delivering coal in reasonable time; but it does appear in the testimony of the plaintiff himself that on no one day did he deliver the minimum quantity of coal he had contracted to deliver, and there is

evidence tending to show that for lack of the proper quantity of coal, the defendant could use but one of his tuyeres; and that by using but one, he could not make as much metal by a ton and a half per day, as he could have made had the plaintiff furnished the minimum quantity of coal agreed to be delivered daily; and that the metal at the time was worth from thirty to forty dollars per ton.

When the defendant failed to furnish the money weekly to pay the wood-choppers, or to pay for the coal as delivered, does not appear; nor does it appear when the plaintiff complained, if ever, before he ceased coaling, that the money was not advanced to pay to the wood-choppers and for the coal as delivered.

There is no allegation in the complaint, that the plaintiff ceased his coaling operations, because the defendant failed to furnish weekly the money to pay the wood-choppers and for the coal as delivered; nor is there any complaint on the part of the defendant that the plaintiff stopped coaling when he did. The commencement of the plaintiff's operations and their stoppage seem to have been by mutual consent of the parties.

But there is an allegation in plaintiff's replication to defendant's counter-claim, that defendant is entitled to no damages for the reason that the non-delivery of the minimum quantity of coal daily, was caused by the defendant's failure to advance weekly money to pay the wood-choppers, but even in this reply there is no allegation that the coal was not paid for as delivered.

The defendant in his counter-claim demands large damages for the non-delivery daily of the minimum quantity of coal. There was evidence tending to show that defendant had sustained damage by this failure on the part of the plaintiff.

The stipulations in the contract, we think, are dependent stipulations, and the counter-claim is the proper subject of a cross-action in this case.

His Honor charged the jury as follows, and this is his entire charge on this complicated case: "That if the plaintiff's contract was not complied with, he could not recover on it; but that the law did not require impossibilities, and that plaintiff was entitled to reasonable time to prepare for execut-

ing it; that if plaintiff was prevented by defendant's failure on his part from furnishing the coal as provided in the contract, he was nevertheless entitled to the value of the articles delivered, and received by the defendant; that if, after the work ceased, any agreement was made for payment, between the parties, then the plaintiff was entitled to recover accordingly." This was said without any reference to the counter-claim of defendant. In this we think there was error. His Honor then handed to the jury a slip of paper in these words:

Plaintiff claims balance	$ 57.77
Wood and coal	560.39
Interest (left with jury)	64.90
Claim and interest	$683.06

Defendant's counsel objected to this paper being handed to the jury.

The defendant's counsel then called the attention of the court to the fact that he had not charged as to the counter-claim. In reply to this suggestion, his Honor told the jury: "That if the plaintiff failed to perform his contract he could not recover, and if defendant failed, he could not recover"; and without further remarks the jury retired, and in their verdict for the plaintiff found the exact amount stated in the slip of paper handed to them.

His Honor in his charge to the jury, gave them no instructions as to the main points in controversy, to wit: whether the defendant was entitled to have his counter-claim considered by the jury, and if so, what damages was he entitled to, or was he entitled to any damages in his counter-claim because, as alleged in plaintiff's replication, his failure was caused by the neglect of the defendant to advance, weekly, the money to pay the wood-choppers. These seem to be principal points in controversy, there being no allegation that the plaintiff did not commence in reasonable time, or that he did not cease operations by the consent of the defendant.

We think his Honor's charge in regard to reasonable time was well calculated to mislead the jury, when he informed them that the law did not require impossibilities, and that he was entitled to reasonable time to commence the execution of his contract, as it was as much as to say to the jury, that if

plaintiff had contracted to deliver daily from five hundred to one thousand bushels of coal, he would be excused from the delivery, upon the ground that it was impossible for him to do so.

We think his Honor was also in error in delivering exhibit E to the jury: *Watson* v. *Davis*, 7 Jones, 178, and *Outlaw* v. *Hurdle and others*, 1 Jones, 150.

There is error. Let this be certified.

PER CURIAM. *Venire de novo.*

THE WOLF CREEK DIAMOND COAL COMPANY v. SCHULTZ ET AL.

(71 Pennsylvania St. 180. Supreme Court, 1872.)

Entirety of conversations. If part of a conversation is given in evidence by one party, the opposite party is entitled to bring out the rest of it. Nor can it make any difference whether the part is brought out by direct examination of a party's own witness or the cross-examination of the witness of his adversary.

Scroll seal to contract of corporation—Waiver—Variance. A contract was signed "Wolf Creek Co. per J. K. Siegfried, Supt. [seal] (a scroll seal) and also with the names and seals of the other parties, who were individuals. *Assumpsit* was brought against the company for breach of the contract; the declaration was on a parol contract; the written contract was given in evidence without objection. *Held*, to be a waiver of the point that the instrument was a specialty. Variance can only be taken advantage of when evidence is offered. To raise the question of the form of action after that, it should have been proved affirmatively that the scroll had been recognized as the seal of the company.

Payment for timber pro-rated on mine—Liquidated damages. By contract S. agreed to furnish the W. C. Coal Co. all the timber they should require at their mines during 1867; they to pay him eighteen cents on each ton of coal mined, and if the amount of coal mined fell short of 75,000 tons they were to pay the difference between the actual tonnage and the specified number of 75,000 tons. *Held*, that the price agreed on by the parties for the fulfillment of the contract was eighteen cents per ton on 75,000 tons, and that the eighteen cents paid on the tonnage not really mined was liquidated damages, and not a penalty.

Distinction between penalty and liquidated damages. Whenever the stipulations of a contract are intended as a measure to determine the amount of a loss, in its nature uncertain, and difficult to be ascertained, it is held to be a liquidation of damages, and not a penalty.

Error to the Court of Common Pleas of Schuylkill County.

Action of *assumpsit* by John Schultz and Thomas Patten, Jr., trading as John Schultz & Co., against the Wolf Creek Diamond Coal Company; the defendants were an incorporated company.

The declaration was for an indebtedness of $12,000, on the common counts. There was also a special count, setting out *in ipsissimis verbis*, as a parol contract, an agreement dated January 9, 1867, between the defendants of the first part and the plaintiffs of the second part, by which the plaintiffs stipulated to deliver to the defendants at a place designated, "all kinds and sizes of sound timber" required about the Wolf Creek collieries for all "mining purposes and repairs inside and outside," from January 1, 1867, to January 1, 1868; in consideration of which the defendants agreed to pay the plaintiffs eighteen cents per ton on all the coal mined from the Wolf Creek colliery, etc. Should the tonnage in 1867 not amount to 75,000 tons, the defendants to pay the difference between the amount shipped and 75,000 tons at eighteen cents per ton; the plaintiffs during the continuance of the agreement, to keep a sufficient supply of such timber as the defendants should require; the timber to be furnished at rates particularly specified in the agreement, and always to keep a supply of timber on hand at the colliery, "at least $2,000 worth." The plaintiffs averred that they had faithfully performed their covenants, but the defendants did not perform their part of the agreement, viz.: they "did not pay the plaintiffs eighteen cents per ton on 45,000 tons of coal, the difference between the number of tons actually shipped, and 75,000 tons," and had not paid the plaintiffs for the timber furnished, etc., "as by the terms of its agreement it had undertaken and promised to do."

On the trial the plaintiffs gave in evidence the contract declared on; it was executed thus:

"In witness whereof the parties have hereunto set their hands and seals this * * *

"WOLF CREEK DIAMOND COAL CO.
per J. K. SIEGFRIED, Supt. [SEAL]
JOHN SCHULTZ, [SEAL]
THOMAS PATTEN, Jr. [SEAL]"

All the seals being scroll seals.

Siegfried testified that the plaintiffs furnished timber during the year as agreed on by their contract; at one time they were a little short of $2,000 worth of timber on hand; there was sufficient for all the company's requirements except for one day; the collieries were never suspended for want of timber. The president of the defendants knew all about the contract with plaintiffs and approved it. There had been a "crush" in July in one of the veins and work was suspended for the remainder of the year; the plaintiffs after the "crush" furnished timber to the defendants as they required. Witness tried to get the plaintiffs to cancel the contract; "after consultation they replied that they would carry out the contract."

On cross-examination the witness, in answer to a question of defendants, said that he told plaintiffs "not to bring any more timber after July, and tried to get them to cancel the contract."

The plaintiffs proposed to ask witness to state "all the conversation which passed between them at the time." This was objected to by the defendants, admitted by the court and a bill of exceptions sealed.

Schultz, one of the plaintiffs, testified that they had a stock of teams and wagons on hand for carrying on the business, and at the beginning of 1867, had $3,500 worth of timber at the colliery; they kept the defendants supplied all the time; after the "crush" Siegfried, the superintendent, told them they need not haul timber for a day or two, and in a day or two told them to haul again.

The defendants gave evidence that the amount of coal actually mined during the continuance of the contract was 29,931 tons; that estimating that amount of coal only, there was still due to the plaintiffs on the 1st of January, 1868, a balance of $2,135.91; there was also on the bank of the colliery at that date $3,117.03 worth of timber. The defendants accounted to plaintiffs for the amount of tonnage actually shipped. Also, that sometimes there was not timber of the kind wanted, and the hands had to stop; they did not mine any coal after their stoppage in June, 1867.

The defendants proposed to ask William Beddow, one of their superintendents, "whether, if the defendants had continued mining during the year 1867, they would or not have

used up more timber than remained on the bank or at the colliery in December of that year." Also to prove by same witness "that prior to the stoppage of mining by the defendants in June, 1867, the quantity of timber consumed was not greater in any one month or for any given period, than would have been required for a like time or period after that time, had the defendants continued to mine for the balance of the year."

Both offers were rejected by the court and several bills of exceptions sealed.

After the evidence had closed, defendants' counsel had closed his argument and plaintiffs' counsel had progressed in his argument, the plaintiffs offered to prove by Mr. Siegfried that the defendants had a corporate seal, that the contract was not executed under the corporate seal, but the individual seal of witness, who was their general agent. The offer was admitted by the court and a bill of exceptions sealed.

The witness testified that the company had a corporate seal; that he did not intend the scroll seal as their seal; it was put there by him at their request; "I intended simply to make a contract that would be binding on both Schultz and the company by me, as their agent. This scroll was put on simply as my own act; I knew this was not the official act of the company."

The plaintiffs asked the court to charge: That if the plaintiffs in good faith entered immediately after making the contract upon its performance, and during the year supplied the timber required according to the terms of the agreement, they are entitled to a verdict for the difference between 29,930⅛ tons of coal actually shipped and 75,000 tons of coal, at the rate of 18 cents per ton, with interest upon such sum from January 15, 1868.

The defendants requested the court to charge:

1. That the plaintiffs' claim for damages in this suit is merely what they would have made under their contract, had the defendants continued to mine during the year 1867.

2. That plaintiffs have not shown they could have made any profit out of their contract, had the defendants continued to mine during the year 1867, and consequently can recover nothing in this suit.

3. That the plaintiffs have offered no evidence of any contract made with defendant, and seek to recover on no other except the agreement of January 19, 1867, in evidence. That such agreement is covenant under seal sealed by the defendants, and that as this suit is an action on the case, there can be no recovery in this suit.

4. The demand of the plaintiffs is according to the *narr.* filed for non-performance of a simple contract obligation in writing of the defendants, and none other; that the plaintiffs have given no evidence of any such contract, and consequently can not recover.

5. That under the whole evidence the verdict of the jury must be for the defendants.

The court charged:

["If the plaintiffs have substantially and *bona fide* complied with their contract, they are entitled to recover. If there are any small deficiencies, they can be compensated for in damages, which should be deducted from the amount due upon the contract."]

"The plaintiffs have supplied the Wolf Creek Diamond Collieries, inside and outside, for the year 1867, with timber under the contract in evidence.

["The defendants agreed to pay for the timber 18 cents per ton on 75,000 tons, whether that amount was shipped or not. This amount the defendants are entitled to recover for, allowing any losses from want of timber to one or two sets of mines, as testified on the part of the defense. This is a sufficient answer to the points."]

The verdict was for the plaintiffs for $11,000.

The defendants removed the record to the Supreme Court by writ of error.

They assigned for error:

1. That the court allowed Siegfried to state additional conversation between him and plaintiffs at the time he asked them to cancel the contract.

2. That the same witness was permitted to testify that the defendants had a corporate seal, but that the contract was executed by his individual seal.

3–4. The refusal to admit the testimony of Beddow.

5 Denying plaintiffs' point.

6–10. Not affirming defendants' points.

11–12. The parts of the charge in brackets.

13. Not submitting to the jury whether the seal to defendants' name and the agreement was the defendants' seal, and whether they had adopted it.

F. G. FARQUHAR and F. W. HUGHES, for plaintiffs in error.

J. W. RYAN, S. W. GEER and L. BARTHOLOMEW, for defendants in error.

By the Court, SHARSWOOD, J.

The first assignment of error is, that after a witness of the plaintiffs below had said on his cross-examination, "I think I did tell Schultz & Company not to bring any more timber after July. I tried to get them to cancel the contract," the learned judge before whom the cause was tried allowed the plaintiffs' counsel to ask him to relate the whole of what was said at that time. It is elementary law, that when part of a conversation is given in evidence by one party, the opposite party is entitled to bring out the rest of it. The whole may be, and generally is, necessary for the proper understanding of all its parts: 1 Greenl. Ev. § 201. Nor can it make any difference whether the part is brought out by the direct examination of a party's own witness or the cross-examination of the witness of his adversary. When the witness said: "I tried to get them to cancel the contract," leaving the inference that Schultz & Company had refused, if they gave any reason for their refusal, it was right that they should have the benefit of it in explanation of their conduct.

The second assignment of error is, that the court permitted the plaintiffs below to prove that the defendants had a corporate seal. It matters not whether this was an error or not, or at what period of the trial the plaintiffs introduced the evidence; it did not harm the defendants below, who are the plaintiffs in error. This action was in form *assumpsit*. The declaration was special on a written contract set out *in hæc verba*. The instrument in evidence had an ink scroll opposite the name of the defendant—by their superintendent. It was also expressed in the body to be under the hands and seals

of the parties. It may be, and there are cases which decide that such a scroll may be adopted and used as a corporate seal: Angell and Ames on Corpor. § 218. In this case, however, the instrument was declared on as a parol contract. It was offered in evidence as such, and not having been objected to, because it was a specialty, it was admitted. This was a waiver, for certainly variance can only be taken advantage of when evidence is offered. If the defendants wished to raise the question of the form of action after that, it was incumbent on them to prove affirmatively that the scroll had been authorized or recognized as the seal of the corporation. Hence, there was no evidence before the jury that this was not a parol contract as declared on, and no question could properly have been submitted to them upon that subject. This disposes also of the eighth, ninth, tenth and thirteenth assignments.

Those which remain relate directly or indirectly to the measure of damages. By the agreement the plaintiffs stipulated "to furnish and deliver" to the defendants "a good and sufficient supply of all kinds and sizes of sound timber," such as might be required by them for all mining purposes for one year, and the defendants agreed to pay the plaintiffs the sum of eighteen cents on each and every ton mined which should be mined and sent away from their colliery, and they also agreed, that should the tonnage not amount to seventy-five thousand tons, they would pay "the amount of difference between the number of tons actually shipped and seventy-five thousand tons, at the rate of eighteen cents per ton." There was no dispute that the number of tons actually shipped was 29,030 19-20, and the plaintiffs had been paid for that amount. It is clear from the point presented by the plaintiffs and which it is complained here that the court did not negative, that all that was claimed below was the difference between the amount of coal actually mined and seventy-five thousand tons at the rate of eighteen cents a ton. This was the measure of compensation or price agreed upon by the parties for the fulfillment of the contract by the plaintiffs. The charge of the court is to be construed accordingly, and could not have been otherwise understood by the jury. The terms of the agreement are perfectly plain, and indeed its construction is not in dispute.

But it is contended that so far as it exceeds the amount of coal actually delivered, it is a penalty, and that the plaintiffs should be limited to the damage actually suffered by them. But how is this to be ascertained with any degree of certainty? Clearly the stipulation is neither in name nor in substance a forfeiture or penalty, but a measure to determine what otherwise would be a loss or damage uncertain and difficult to be ascertained. Whenever this is the case it is held to be liquidated damages: Sedgwick on Dam. 449; *Westerman* v. *Means*, 2 Jones, 97; *Streeper* v. *Williams*, 12 Wright, 450. In *Powell* v. *Burroughs*, 4 P. F. Smith, 329, just such a covenant in the lease of a coal mine for the payment of rent was held to be liquidated damages to the extent of non-performance, and it is there said that "the uncertainty as to the extent of the injury which may ensue, is a criterion by which to determine whether it is a case of liquidated damages or a penalty."

Judgment affirmed.

THE YOUGHIOGHENY SHAFT COMPANY ET AL. V. EVANS ET AL.

(72 Pennsylvania State, 331. Supreme Court, 1872.)

[1] **Promise of officer to pay corporate debt—Pleading.** Evans declared against a corporation and its president and secretary jointly, but showed no evidence of a joint contract by the defend nts, nor any special circumstances, except that the plaintiff having mined for the company, the president told plaintiff he would see him paid for it. *Held*, that the action could not be maintained; that the promise of the officer, if it created any contract at all, made a contract of suretyship, and created no joint liability upon the contract of the corporation.

The personal liability of stockholders can not be enforced in *assumpsit*, without a special count on the statutory liability.

Error to the District Court of Allegheny County.

Evan E. Evans and others, trading as Evans & Co., brought an action of *assumpsit* against the Youghiogheny Shaft Company, James Trunick and W. W. Fullerton.

The plaintiffs declared against the above named defendants jointly, in the common counts.

[1] *Bushnell* v. *Church*, 2 M. R. 479.

The affidavit of claim was for work and materials done and furnished "for the said Shaft Company at the instance and request of the president and the agent thereof, at the coal works of the said company in Westmoreland county, from November, 1868, to January 7, 1870," as set forth in the account annexed to plaintiff's *præcipe*, affidavit of claim and *narr.* as follows:

THE YOUGHIOGHENY SHAFT COMPANY,

To EVAN E. EVANS, Dr.

November, 1868, to January 7, 1870.

To driving entries for the said company, in their coal lands in Westmoreland county, 350 yards at $9.00 per yard	$3,150.00
To furnishing one pump and fixtures	2,009.00
To expense in putting in the pump, and freight, etc., thereon	600.00
To making two dams in the entries	150.00
	$5,909.00

Trunick was the president and Fullerton the secretary of the Shaft Company.

On the trial the plaintiff gave in evidence an agreement dated January 1, 1868, between the Shaft Company and Henry Bailey, by which the company leased to Bailey for two years, their coal works, etc., with 400 acres of coal land, shaft, buildings, etc. Bailey to pay one half cent per bushel on the terms mentioned; the lease to be continued for three years more at the option of Bailey; "any permanent improvements that may be necessary during the term shall be made with the advice and consent of the president of the Shaft Company," at the cost of the company.

The agreement was executed as follows: "In witness whereof, the said Henry Bailey has hereunto set his hand and seal, and James Trunick, president of the said Youghiogheny Shaft Company, has signed his name and caused the official seal of the said company to be hereunto attached, and also to be countersigned by the secretary of said company.

"JAMES TRUNICK, [SEAL.]
"President.
"HENRY BAILEY. [SEAL.]
"W. W. FULLERTON,
"Secretary.

[Seal of the Youghiogheny Shaft Company.]

"Sealed and delivered in the presence of
"JOHN FULLERTON.

"The within agreement is fully ratified and approved by us.
"JAMES TRUNICK,
"JAMES A. HUNTER, } Committee."
"J. G. MCQUAIDE.

The plaintiffs gave in evidence an agreement between Henry Bailey and Evan E. Evans, dated January 1, 1869, by which Bailey leased to Evans the same premises, etc., mentioned in the foregoing agreement, Evans to pay to Bailey one half cent for every bushel of coal mined; and by which it was agreed "that the expense of mining and entry under the bed of the Youghiogheny river that may exceed the worth of the coal mined, shall be deducted from the rents of the mines and the proper cost of the same; said entry to be put through as fast as possible."

Evans, the plaintiff, testified that Trunick, the president of the Shaft Company, directed how the entries for the coal should be driven, and urged witness to have them driven on "and get the thing into a good shape so that he could sell the property, and he would see I should be paid for it." The entries were made under the direction of Trunick; he furnished the cement; they would have to go through one Smith's land and could not get his consent; Trunick directed witness to ascertain from Smith what he would take for his land. Trunick, on being informed of Smith's proposition, said he could do nothing for witness. Evans' interest in the lease was sold by the sheriff under an execution issued by Trunick on a judgment against him which Trunick had bought. Fullerton, the secretary of the company, bought Evans' interest. Trunick said he would see that Evans would be paid for the pump; nothing was done without the advice of Trunick. The pump with its connections cost $2,009.16, for which a judgment note was given, under which Evans' interest was sold by the sheriff.

There was other evidence that Trunick was present frequently whilst the work at driving the entries was progressing, and gave directions concerning it.

All the foregoing evidence was given under objection and exception by the defendants.

The foregoing is a synopsis of the evidence as bearing on the liability of Trunick and Fullerton.

Amongst others, the following are points of the defendants and their answers:

5. There is a misjoinder of the corporation with James Trunick and W. W. Fullerton, the other defendants, and therefore plaintiffs can not recover.

Answer: "This point is refused."

6. There is no evidence in the cause tending to prove a joint undertaking or a joint liability of the defendants to the plaintiffs, and therefore plaintiffs can not recover.

Answer: "This point is refused. As detailed and for the reasons given and subject to the instructions as to the burden of proof given by us in answer to the fourth point of defendants, we leave the question to the jury to be determined by them from all the evidence in the cause."

7. There is no evidence in the cause tending to show any legal liability of W. W. Fullerton, one of the defendants, to the plaintiffs, and therefore plaintiffs can not recover.

Answer: "Refused. We leave this to the jury, under instructions as already given."

11. Even if the jury believe that James Trunick did say to E. E. Evans, "to push those entries on, and he would see that I (Evans) would pay for them," or words to that effect, the plaintiff can not recover upon such promise or undertaking against the defendants in this action.

Answer: "This point is refused. We leave it to the jury to say what Trunick intended, and how far, if at all, he intended to be bound by the language used in the point."

The verdict was for the plaintiffs for $1,923.20.

The defendants removed the record to the Supreme Court, and there, amongst other specifications, assigned the answers to the foregoing points for error.

A. M. BROWN, for plaintiffs in error.

C. B. M. SMITH, for defendants in error.

By the Court, AGNEW, J.

There is a fundamental error running throughout this

case, which must put an end to the action in this form. The plaintiff declared against the corporation and Trunick and Fullerton as joint debtors. There is no evidence of a joint contract by these defendants, or of such a joint relation between the corporation and the individual defendants, as will support an implied contract jointly, to pay for the work and labor declared upon. There is not the silghtest testimony that Fullerton made any assumption personally, and the only evidence as to Trunick is that while acting as president of the company he told Evans he would see him paid. Such an agreement, even if intended as an individual assumption, would not be joint, but several—a promise of suretyship, and not that of a principal. Several of the points of the defendants presented this error of misjoinder, but were refused by the court. It is now argued that the purpose of the action was to enforce the liability of the individual defendants as stockholders of the corporation, under its charter, or laws relating thereto. But no such purpose appears in this record. The declaration is in general *assumpsit* against all the defendants jointly. Neither the charter of the company nor the law under which it was organized was given in evidence. The evidence as to the individual defendants is that one was president and the other secretary of the corporation. No point was made upon their liability as stockholders. From the whole case we derive no intent to charge them as stockholders. The liability of stockholders is secondary, and the proceeding to enforce it statutory, not at common law. It was, therefore, held in several decisions that in such case, the proceeding is wholly governed by the statute, and the rights and liabilities of the parties must be ascertained by it: *Brinham* v. *Wellersburg Coal Co.*, 11 Wright, 43; *Hoard* v. *Wilcox*, Id. 51. A reference to these cases will show that the form of this action is wholly misconceived, if it were intended to enforce a statutory liability of the stockholders in this way.

Judgment reversed.

The court afterward granted a *venire facias de novo.*

UNION PETROLEUM CO. v. BLIVEN PETROLEUM CO.

(72 Pennsylvania State, 173. Supreme Court, 1872.)

Contract licensing to sink oil wells, construed as to the remedy. An agreement was to lease "the exclusive right and privilege of boring for oil, etc., upon the farm upon which the first party now resides, with the right of access to and from such places as may be selected by the party of the second part; said boring to be done so as to do the least possible injury to the farm." The consideration was $150, and one third of product. The holes to be sunk to satisfy the parties as to practicability and profit for oil: *Held*, that this created an incorporeal hereditament, and the only possession of the grantee was such as was necessary for the enjoyment of the right. *Held*, further, that the remedy for disturbance of the right was case and that ejectment would not lie.

[1] **A first judgment in ejectment** is not conclusive against either parties or privies, nor against persons holding easements upon the land.

Possession, by the owner of an incorporeal hereditament, is not necessary to be proved, in his action on the case for being disturbed in its enjoyment.

Qualified possession. The possession of the owner of an easement is such qualified possession only as is essential to the enjoyment or assertion of the privilege.

Error to the Court of Common Pleas of Venango County.

This was an action on the case by the Bliven Petroleum Company against the Union Petroleum Company.

The declaration was that the plaintiffs were the owners in fee of "certain incorporeal hereditaments, to wit, the right and privilege of digging and boring for salt, oil and minerals, upon certain lots, parts of a tract of land known as the John McClintock farm, * * with the right of ingress and egress * * for the purpose of digging for said salt, oil and minerals * * giving to John McClintock one third part thereof. Yet the defendants * * entered on said lots * * and into the possession of certain oil wells which the plaintiffs had thereon, and excluded the plaintiffs therefrom and from the enjoyment of their said right and privilege and obtained and collected large quantities of oil * * which the plaintiffs could have collected for their own use."

The defendants pleaded "not guilty."

[1] *Equator Co.* v. *Hall*, 106 U. S 86.

By the plaintiffs' evidence upon the trial it appeared that the land upon which the wells were, belonged to John McClintock and was situated in Cornplanter township, Venango county.

On September 26, 1859, an agreement was entered into between John McClintock of the first part, and Bradford R. Alden and Cornelius S. Chase of the second part, as follows:

"That the said party of the first part, for himself, etc., agrees to and with the said second party, their heirs, etc., to lease, and by these presents has leased, unto the said second party, etc., the exclusive right and privilege of boring for salt, oil or minerals upon his farm, situate in Cornplanter township, etc., and upon which the said first party now resides, being two hundred acres, more or less; with the right of access to and from such places as may be selected by the party of the second part for the purposes aforesaid, and the right to build such houses and buildings as shall be necessary to carry on the work comfortably; said boring to be done so as to do the least possible injury to the farm.

"And the said party of the second part, for themselves, etc., agrees to and with the said party of the first part, that they will give to the said first party for the privileges hereinbefore granted, the sum of one hundred and fifty dollars, and the just and full one third part of all the oil and minerals raised and the salt made from and upon the premises aforesaid, and that the work shall be commenced on or before the first day of June, 1860, and that the holes shall be sunk to a suitable depth to satisfy the parties as to their practicability and profit for oil. And it is agreed that this lease shall continue until the parties, their heirs or assigns, shall mutually agree to annul it. * * It is further understood, that the obligations to bore, of this lease, on the part of the party of the second part, shall be fulfilled when they have made one boring of sufficient depth to be profitable to them for oil, or when they shall have made one boring of seventy feet depth, if practicable, and shall pay to the party of the first part the sum of seventy-five dollars, and the same obligations to bore shall be fulfilled at any time by the payment to the party of the first part of the sum of one hundred dollars."

By a partition subsequently the title became vested in Alden

alone. On the 28th of January, 1865, Alden conveyed to the Bliven Petroleum Company, the plaintiff.

The plaintiffs gave evidence, also, that the defendants had occupied, by their agents, a portion of the land leased to Alden and Chase, had worked the wells put down by Alden, and excluded the plaintiffs from occupying it: also of the quantity and value of the oil raised and appropriated by the defendants. They gave evidence also as to the lines of the land included in their lease. There was also evidence that Allen Wright had a lease from Alden and Chase, afterward passed to the "Allen Wright Oil Co.," and sank wells known as No. 81 and No. 84, on what was claimed to be covered by the lease to Alden and Chase. The defendants claimed the wells to be on their lands; this suit is brought for the disturbance of the plaintiffs' rights and privileges in these wells.

The defendants gave in evidence the records of the Circuit Court of the United States for the Western District of Pennsylvania, in an action of ejectment, in which the Union Petroleum Company, a citizen and corporation of the State of New York, were plaintiffs, and George King, S. A. Lyon and R. Green, citizens of Pennsylvania, were defendants. The record showed as follows:

The marshal returned the writ served on the defendants, and also on D. F. Myer, George Crippen and Samuel Davidson.

The premises described in the writ were "a strip of land in Cornplanter township, Venango county, containing 6 acres; being 160 perches long by 6 perches and 2–10 wide; bounded on the north by the Rynd farm, on the east by other land of this plaintiff, on the south by the Buchanan farm and on the west by land known as the McClintock farm."

October 6, 1865, a rule was taken on the defendants to appear in six weeks; the marshal returned that the rule had been duly served upon King, Lyon and Green.

An affidavit of defense was made by Allen Wright, a director of the Allen Wright Oil Company, "which has the lease, management and control of the land and property from which the plaintiffs seek to eject the defendants," and averred that the defendants had "a just and legal defense on the merits."

This affidavit was filed November 29, 1865.

On the 5th of March, 1866, the defendants pleaded "not guilty." On the 10th of March, 1866, the court appointed William Hilands "to survey the claims of both parties, and to ascertain the quantity and interference of each party, and to note such circumstances as may affect or be deemed material to the title of either of the parties."

The jury found for the plaintiffs "and fixed the western line of the plaintiffs' land as the line run by William Hilands, the artist appointed by the court, and marked on his plot by the signature of the clerk of the court, which plot is now filed of record as part of the verdict in the case," etc.

A writ of *habere facias* was issued on the 25th of January, 1867, to which the marshal returned:

"And now this 31st day of January, 1867, entered upon the within named premises, 'defendants all being absent,' and placed E. W. Hinds, agent Union Petroleum Company, of New York, in full possession of the same. No property of the defendants found."

The defendants then gave in evidence the map made by Hilands under the direction of the Circuit Court; also deed, dated May 19, 1860, from John McClintock to John Nelson McComber, granting to McComber for the consideration of $1,500 a piece of land in Cornplanter township, beginning at a black oak, the southeast corner of McClintock's farm, "thence north, etc., to the northeast corner thereof, thence west 35 chains and 64 links, or far enough so that a line drawn south through said lot shall contain 130 acres, and thence south or to the Buchanan farm, thence east, etc., to the beginning, containing 130 acres."

They then gave evidence tracing this title to the defendants on the 29th of June, 1864. They gave evidence that McClintock had contracted by articles for the sale of this land to Richard Dempsey, who sold his interest to McComber, and the deed made as above stated, directly from McClintock to McComber. The evidence was, that at the time of the contract between McClintock and Dempsey, the land was unimproved and in wood, and was so when sold by Dempsey to McComber. Hilands testified that according to the line run by him, well 84 would be within the claim of the defendants, and that the line ran through well 81. There was evidence

of a line run by Irwin which put both wells on the plaintiffs' claim; and also of acquiescence in that line by McClintock, Dempsey and McComber, predecessors in title to the defendants, and that the plaintiffs had been using the wells until the defendants were put into possession by the *habere facias* from the circuit court of the United States.

The charge of the court and the defendants' points and answers following, with the foregoing statement, will sufficiently exhibit the case.

The court charged—"This action is for the recovery of damages plaintiffs allege they have suffered by reason of a disturbance or hinderance of their rights to enter and take oil from a tract of land owned by McClintock—I speak of him as the owner, for he contracted as such and so conveyed portions of the tract—and others who were interested with him, subsequently released to his grantees, confirming his respective contracts and conveyances. It is unnecessary to say anything about the title which was vested in John McClintock, for both parties claim under him. The plaintiffs claim under the articles of agreement dated September 26, 1859, with its supplement, made by Alden and Chase. The defendants claim under a deed by McClintock to J. Nelson McComber, dated May 19, 1860. Neither party questions the right of the other under their respective grants. It is not denied that the right, of Alden and Chase, so far as relates to this action, has become vested in the plaintiffs, nor that the title of J. Nelson McComber is now vested in defendants. You observe at once, that the contest is not about the plaintiffs' right to take oil from the land of McClintock, nor as to the validity of the defendants' title to the land embraced in the deed to McComber, but is as to the true location of the division line between the part sold to McComber and the balance of the tract.

"As a rule, known landmarks and adjoiners on the ground bounding a tract of land conveyed, control the courses and distances in the deed; if there is a difference between the description in the deed and the marks on the ground, the latter govern; when there are no marks on the ground, or certain adjoiners, then the description in the deed is conclusive. A conveyance of a certain number of acres off one side of a tract

of land, when there is no line of division marked, entitles the grantee to the entire quantity conveyed, as called for in the deed. If there was a survey and the division line distinctly marked on the ground, and the deed apparently made with reference to the survey and line, in the absence of other evidence, the line so marked bounds the land conveyed.

"The land in dispute is a piece of a few rods wide extending across the McClintock tract. Prior to October 16, 1866, it seems that the plaintiffs were exercising their alleged right on this land, and had possession of so much of the surface as was necessary to the enjoyment of the grant, their lessees actually operating and producing oil; and McClintock had possession for all other purposes. Since that date the defendants have been in possession, and they claim the right to hold it for all purposes, including operations for producing oil.

"The plaintiffs allege that defendants have obstructed and hindered them from exercising any right on the land since the fall of 1866. How is this? For if you are not satisfied from the evidence of such obstruction and hinderance, there can be no recovery. This is not an action of ejectment to recover possession of the land, nor trespass for injury done to plaintiffs' possession; but case for obstructing and hindering the plaintiffs in the exercise of an alleged right; and if no obstruction or hinderance, your verdict will be for the defendants.

"Had McClintock himself interfered with plaintiffs' right to enter and take oil, the remedy would be the same as that now sought to be enforced against defendants. If he were asserting and attempting to enforce his rights to the possession of the soil, his remedy would be ejectment or trespass. For an injury done to the owners of an easement or incorporeal hereditament, case is the remedy.

"If you find that defendants, having possession of the land since the fall of 1866, have prevented the plaintiffs and their agents from exercising the right to search and obtain oil therefrom, the next inquiry is as to the title of the disputed land. From the evidence, you are likely to find that McClintock in 1857 or 1858, by agreement in writing, contracted to sell and convey unto Richard Dempsey one hundred and thirty acres of land and allowance, off the east end of the

tract, and that Dempsey by oral agreement sold his equitable title to McComber, to whom McClintock made the deed, dated 19th of May, 1860, at Dempsey's request. Before the execution of this deed, McClintock and Dempsey agreed that Irwin should survey the land and he did so, McClintock and Dempsey's father being present and assisting. If this survey was not correct, either could have had it resurveyed. Both knew the manner in which it was made, or could have known, Dempsey having employed his father to assist in making it. If the surveyor was acquainted with and knew the distance of the tract line, as measured on the ground, and for this reason only measured one line to ascertain the place to mark the line of division, it was a sufficient survey, and binding if acquiesced in by the parties. Was this survey and the line marked on the ground by Irwin, referred to as the boundary in the deed? At that time there had been no other survey, no other but the one division line was marked.

"The Hilands line was not run until after the dispute and commencement of the suit in the Circuit Court of the United States.

"You will remember the testimony of McComber who testifies that the line was spoken of at the time of the delivery of the deed, and McClintock agreed that if it was not far enough west to include the quantity, it should be changed. Do you find this to be the fact? If so, the defendants have a right to the quantity the same as if no line were marked. In determining this question you judge of the credibility of witnesses, and consider every fact proven that throws any light upon it. The deed gives the distance of each line from corner to corner, and as a part of the description adds that one line should go far enough to include the quantity. If there was no line marked on the ground, or if it was agreed that the marked line should be changed if not including the quantity, the defendants have a right to a line that will include it.

"But if there was no such agreement, and the survey made and line marked, you may infer that the deed was in reference thereto. In this connection you will consider how the parties claimed and occupied after their making the deed.

"The plaintiffs allege that McClintock held possession and

occupied up to this line without objection till near the time of the commencement of the suit in the United States Court and that McComber, and those holding under him only claimed, cut timber, improved and occupied up to this line for a number of years. Is this allegation true or false? If true, such acts of the parties will be considered as tending, with other evidence, to show the marked line was referred to in the deed. If false, there will be the greater reason to credit the testimony of McComber as to what he says of the changing of the line so as to include the quantity. If you find that the survey of Irwin was satisfactory to McClintock and Dempsey, that the deed was made in reference to that survey, and the line of division marked on the ground, and that McClintock and McComber, and those holding under them recognized it, occupied and claimed to it, as the true line for several years, it ought not to be disturbed even if it be found that there is not the entire quantity called for, embraced in the boundaries. Having made these remarks that you may better understand the case, the answer to the points will be submitted. Should you find for the plaintiffs, the remaining question for you is the amount of damages. The damages will not exceed the actual injury done to the plaintiffs. The burden of proof is on the plaintiffs to show the extent of injury done, and you will not allow them more than a fair compensation for such injury; although it may be difficult to prove, they can not recover more than is proved.

"In estimating the damages you will allow only for the oil taken, which belonged to the plaintiffs, and not for the part belonging to their lessees:"

The defendants' points and their answers were:

1. The certified copy of the record of the Circuit Court of the United States, in the case of the Union Petroleum Company against George King, L. Lyon, R. Green and others, said record being in evidence and being ejectment and for the land upon which the trespass or disturbance is alleged by the plaintiffs to have been committed, and the said record showing that the plaintiffs, the Union Petroleum Company, recovered said land and were put in possession by the United States marshal, the defendants would be rightfully in possession, and could not be either trespassers or disturbers by reason of said posses-

sion, acquired by law and the judgment of a court having jurisdiction of the subject-matter and the parties.

"Answer: In reference to the facts in this case—answered in the negative. The judgment in that case is conclusive on all the parties and their privies. Had the plaintiffs in this case been a party to that action, there could be no recovery in the present action. But the Bliven Petroleum Company, or any one under whom they claim, or their lessees, the Allen Wright Oil Company, are not parties to that suit in ejectment, and are not bound by the judgment. The real owner of the land, or of an interest therein, shall not be defrauded of his title by a suit and recovery whereof he had no legal notice. The owner of the land ought to be made a party by the service of the writ, or should not be deprived of his right, by any judgment thereon. As to King, Lyon, Green and the other defendants, the return of service does not show they were tenants of the plaintiffs, the Bliven Petroleum Company. But the judgment is conclusive as to them, until reversed or set aside by the proper tribunal. Were they, or those under them, the plaintiffs, there could be no recovery here for anything done by the defendants, up to the Hilands line. That verdict and judgment fixed the western boundary and protected the defendants against the parties, but in no particular as against those who were not parties or privies.

2. The service of the writ on the defendants, George King and others, and shown by said record of the Circuit Court of the United States to have been served upon the tenants in possession, is evidence that they were the persons in actual possession.

6. The plaintiffs can not recover in this form of action, unless they show to the satisfaction of the jury, that they were in actual possession of the premises, upon which the disturbance is alleged to have occurred; and if the testimony of Allen Wright and Nelson (witnesses called by the plaintiffs) is believed, and it is not contradicted, the Allen Wright Oil Company was in possession at the time the acts complained of took place, and Allen Wright testifies that he and his associates sunk wells No. 81 and 84, pumped them for more than six months, and then transferred their interest and possession to Allen Wright Oil Company. If this testimony is believed,

the plaintiff has not been in possession and can not recover.

Answered in the negative.

The defendants proposed to send out with the jury the certified copy of the record in ejectment, in the United States Circuit Court, including as thereto attached, all affidavits, depositions and other copies of papers, to which plaintiffs objected; the court refused to permit the record, with such papers attached, to be sent out with the jury, and at the request of defendants sealed bill of exceptions.

The jury found a verdict for plaintiffs for $8,190.

The defendants took out a writ of error.

They assigned for error the answers to the defendants' points, submitting to the jury the question of damages, there being no evidence of injury to the plaintiffs, and the refusal to allow the record of the Circuit Court to go out with the jury.

G. DE CAMP, for the plaintiff in error.

C. HEYDRICK, for defendants in error.

By the Court, SHARSWOOD, J.

The title of the plaintiffs below, derived under the articles of agreement of September 26, 1859, between McClintock, the owner of the land, and Alden and Chase, was to "the exclusive right and privilege of boring for salt, oil or minerals," upon the McClintock farm, in Cornplanter township, Venango county, and in that respect was not to be distinguished from that which came under consideration and was passed upon by this court, in *Funk* v. *Haldeman*, 3 P. F. Smith, 229. It is true that the word "exclusive" was not used in the grant in that case, yet upon the construction of the instrument it was held to be exclusive, and that the grantors had no mining privileges in common with the grantees. There, as here, the right granted was to experiment for oil; if found, to sever it from the land, and to take it, on yielding a third to the landlords as a chattel, not as any part of the realty. And the only possession to which the grantee was admitted was such as was necessary to the exercise of this right. The fact that one hundred and fifty dollars was in this case paid down in cash does not change the character of the grant.

It was not, as in *Caldwell* v. *Fulton*, 7 Casey, 475, a conveyance of the full right, title and privilege of digging and taking away stone coal to any extent the grantee might think proper, which was held to be a conveyance of the entire ownership of the coal in place. It was, therefore, as in *Funk* v. *Haldeman*, the grant of a mere incorporeal hereditament. Indeed, we do not understand this to have been controverted in the court below, nor has it been made a question in this court. It follows that the only remedy which the plaintiffs had for the disturbance of their right was an action on the case. Ejectment they certainly could not have maintained.

What, then, was the legal operation and effect of the verdict and judgment in ejectment recovered by the defendants below in the Circuit Court of the United States? It certainly could have no other or greater force than a similar proceeding in a court of this State would have had. Giving it all the conclusiveness claimed for it, as it was a recovery of the land, it may well be doubted whether, not being for the same subject-matter now in controversy, it can have any effect whatever, even persuasive, upon the title of a person to what is only an incorporeal hereditament issuing out of, annexed to, or exercisable within the land, unless indeed such incorporeal right was derived by grant from the party against whom the recovery was had, as to which no question is raised on this record for our determination. Had McClintock's title to the farm been set aside in favor of an adverse claimant, then, indeed, the grant must have fallen with it. But passing by this question, and admitting for the sake of the argument, that the plaintiffs below were in fact the real parties in the action in the Circuit Court, or that it was a question which, upon the evidence, ought to have been submitted to the jury, it presented the case of only one verdict and judgment in ejectment, which clearly was inconclusive of the title, even between parties and privies. Such a verdict and judgment are evidence in a subsequent ejectment only as persuasive. It is true that no action could have been maintained against the sheriff or the plaintiffs in the ejectment for the entry on the land by virtue of the *habere facias possessionem;* but it by no means follows that when the plaintiffs in that proceeding were thus put in possession under that writ, it gave them any right to

take the oil which belonged to the plaintiffs below, if, indeed, their title to it was otherwise established by the evidence, of which no question has been made for our decision upon this record. If it could establish such right, it would give an effect to one verdict and judgment in ejectment, which has never been thus far pretended or thought of, and forever bar the owners of an incorporeal hereditament from any recovery whatever. It is not material, then, whether the reasons given by the court below for their answer to the first point of the defendants were right or wrong; the answer in the negative was proper, and the plaintiffs in error have, therefore, no right to complain of it. Indeed, the learned president seems himself to have come to this conclusion; for, in his opinion on the motion for a new trial, printed in the plaintiff's paper-book, he says: "Perhaps it was error to say that one verdict and judgment would be conclusive on any one in an action like the present, who would have no remedy in any other form, but, if error, it did no injury to the defendants. Had this point been material and more fully considered, the instruction as to the effect of one judgment might have been different." It is entirely unnecessary, therefore, in the view which we have taken of the case, to consider the question, which was the principal if not only one discussed before us, whether the plaintiffs below, on the evidence, if believed by the jury, were parties or privies to the action in the Circuit Court of the United States.

As to the assignment of error that the court erred in answering in the negative the defendants' sixth point, which was in substance that the plaintiffs could not recover in this form of action unless they had shown to the satisfaction of the jury that they were in actual possession of the premises upon which the disturbance was alleged to have occurred; no authority has been cited in support of it, and it is apprehended that none can be found. On the contrary, it is very clear from the nature of the case, that possession of the land is not necessary to enable the owner of an incorporeal hereditament to recover damages in this which is the only form of action to which he can resort. In general he has no right to the possession of any part of the land. The grantee of a rent has no right to such possession, yet, if he is obstructed and prevented from his distress, which is the mode by which he can enjoy or

enforce his right if denied, he surely can maintain his action. The grantee of a way over another man's land has indeed a *pedis possessio* while in the actual use of it, but no one has ever supposed that it was necessary that he should be actually walking over the land when the way is stopped up or obstructed, or another, who has no right in common with him, uses it unlawfully to his injury. In grants of the right to bore for oil there is, indeed, usually, as in this case, a right to the possession of so much of the land as is necessary for the exercise of the privilege; but that, like the right of ingress and egress, is but an incident of the incorporeal hereditament. Possession of that might, no doubt, be gained or lost by ejectment, or enforced by trespass *quare clausum fregit*. To the latter action actual or constructive possession is necessary in the plaintiff, but never to an action of trespass on the case, as in the common instance of a reversioner suing for a permanent injury to the freehold.

The court below we think were right in not allowing the affidavits and depositions attached to the record of the judgment in the Circuit Court to go out with the jury.

Judgment affirmed.

CUTTER ET AL. v. DEMMON.

(111 Massachusetts, 474. Supreme Judicial Court, 1873.)

Stock sale—Efficiency of the common counts where a recovery is allowable upon either view of contested facts. In this case the evidence was such as to warrant the jury in finding that there was an understanding by which C. authorized D. to sell his stock at the same price as he sold for himself, and that in pursuance of it C. delivered 56 shares of his stock to D. for the purpose of such sale; or they might find, independent of any such understanding, that the proposition on which C. parted with those shares was that "certain western parties wanted to buy a majority of the stock," and that D. was negotiating the sale for himself and others, and that $40 per share was named, not as the price of sale to D., but as the highest price which could be obtained from the "western parties," and upon either of these findings C. would be entitled to recover the price for which his stock was in fact sold, upon the common, disregarding the special, counts.

Contract by James M. Cutter, Levi L. Tower, Stephen A.

Tower and Isaac L. Kidder, partners under the style of Cutter, Tower & Company. The first count of the declaration alleged that the plaintiffs were possessed of 112 shares of the capital stock of the Butler Colliery Company; that the defendant requested them to put their said stock in his hands for sale; that they did so put their stock in his hands, and he agreed in consideration thereof to sell it at the same terms as his own; that he sold his own stock for $60 a share, and also 56 shares of the plaintiffs' at the same rate, and owed the plaintiffs the sum of $1,120, being the amount of 56 shares at $60 dollars per share, less the sum of $2,240 already paid on account. The second count was for money had and received.

Tower, one of the plaintiffs, testified that the plaintiffs owned 112 shares of the stock of the Butler Colliery Company; that a year or more before the sale declared on, he had gone to the defendant and told him that the plaintiffs would sell their stock at the same price and at the same time that he did his; that the defendant told him that when he sold his own he would sell the plaintiffs'; that the witness authorized him to do so; that the agreement had never been rescinded; that in August, when the sale took place, the witness was away; that the defendant was one of the directors of the company; and that there had been previous efforts made to sell the property of the company.

Kidder, one of the plaintiffs, testified that in August, one Daniel L. Demmon, the defendant's brother, "came to him, and upon finding that Tower was away, told him that there were certain western parties who wanted to buy a majority of the stock of the company, and asked him if they wanted to sell theirs; that they would give $40 cash, or $45 in notes, per share; that the witness said he thought it was too low, but that the plaintiffs would do whatever they did, meaning the directors; that the next day, Daniel L. Demmon called and told him that all they would take was 56 shares, and they could get no better price than the one named the day before, and if he wanted to sell, he must do it then, as they could not wait, as the bargain was to be closed the next day; that the witness asked if he could not get more than $40 per share; that the defendant said 'That is all we can get for it, and you shall have the same for yours we get for ours'; that the

witness said that if that was all they were getting for it, he supposed he would sell; that he supposed he was selling to the western parties; that he then went down to the office of Daniel L. Demmon, who was the treasurer of the company, and transferred his shares, and Daniel L. Demmon went out and got the money and paid him for them $40 per share, and that he had been advised by Tower, and knew of the bargain between Tower and the defendant." On cross-examination, he testified, "I supposed I was selling with the directors and that all acted together."

Thomas Scott testified that he was present at the conversation between Kidder and Daniel L. Demmon; that the latter said, "We want the stock, and if you will sell, we will all share alike; you shall have the same that we get."

The plaintiffs called the defendant as a witness, who testified "that he and one Butterfield made a contract in writing with certain parties from Western New York, by which they agreed, in one week, to deliver 650 shares of the Butler Colliery Company to them, at $60 per share; that not having stock enough, he asked his brother, Daniel L. Demmon, to get the balance for him wherever he pleased, so that they could fulfill their contract; that he instructed Daniel L. Demmon to get these shares for him, and have them ready for delivery on a certain day; that that was all the instruction his brother ever had; that at the time appointed, Daniel L. Demmon had obtained the requisite number of shares; that the defendant, taking his own stock and the 56 shares received of the plaintiffs, transferred them to the western parties to fulfill the contract; that the stock was sold to the western parties for $60 a share; that he, the defendant, did not know from whom the shares were purchased; that he gave no limits to Daniel L. Demmon, as to the price, because he must have the shares at any price; that the shares were delivered according to contract and the money paid; that he had never agreed to sell Tower's stock, or to become in any way responsible for it; and that he never had any of it in his possession." This was substantially the evidence offered by the plaintiffs.

The defendant contended that the evidence offered did not tend to prove the case stated in the declaration; that as it appeared that there was another party equally liable, he should

be summoned in to defend; and that there was no evidence on which the case could be submitted to the jury; but these objections were overruled by the judge, and the defendant was ordered to proceed.

Daniel L. Demmon testified "that he was called to the defendant's office, and was told that the defendant and one Butterfield had made an agreement to deliver 650 shares of the Butler Colliery Company's stock to certain western parties on a certain day, and they wanted the witness to purchase about 400 shares, which, with what they owned, would make up the amount; that thereupon he went to various parties and offered to buy their stock at $40 cash, or $45 notes; that he went to the plaintiffs among others; that he saw Kidder, asked him if he wanted to sell his stock, and told him he had been to several parties and they were going to sell for that price; that Kidder asked him if that was the most anybody got; that Kidder did not decide; that he went again the next day and told Kidder he must make up his mind or he would lose his chance to sell; that Kidder asked him if that was the highest price that he could get for it; that he answered that that was all he could pay for it, and that he had paid no more than that for all he bought; that thereupon Kidder sold him the stock and transferred it to him; that he paid him for it $40 per share; that he never told Kidder that that was all they could get for it; and that he did buy all the stock for $40 per share."

The defendant also called one of the directors of the company and asked him how much he sold his stock to Daniel L. Demmon for. The plaintiffs objected, and the judge excluded the evidence.

In rebuttal, Tower was allowed, against the defendant's objection, to testify to a conversation he had with the defendant, since the case had been closed for the defendant, in which the defendant admitted that on one occasion, some year or more before the sale of this stock, he had, when the company was trying to sell out to one Green, agreed to sell Tower's stock if he did his own.

The defendant contended that there was no evidence to go to the jury; that the defendant was not bound by the statements of his agent to Kidder as to the price he was getting for the stock; and that the defendant could not be held for

any fraud or deceit of Daniel L. Demmon, among other reasons, because there was no evidence that told the plaintiffs he was the agent of the defendant.

The judge, among other instructions to which no exception was taken, instructed the jury as follows:

"It is necessary for the plaintiffs to show that their stock was transferred at the request of the defendant, upon his agreement that they should receive as much as he received. The plaintiffs rely: 1st. On an agreement previously made with them by the defendant personally, to the effect above stated, and upon a subsequent delivery of the stock under it. 2d. Upon an agreement made at the time of the delivery of the stock with the defendant's agent, under which delivery was made to the effect stated. These agreements are denied by the defendant, and the plaintiffs are to make out the one or the other in order to recover. The plaintiffs are to show, also, that the defendant has received a larger sum upon the stock which the plaintiffs transferred than he paid over to the plaintiffs, and are entitled to recover, if they recover at all, only that overplus.

"If the contract made at the time of the delivery of the stock has been shown by the plaintiffs as claimed by them, but such contract is shown to have been made with Daniel L. Demmon as agent for the defendant, they may recover of the defendant, even if Daniel L. Demmon did not disclose his agency. The burden of proof is on the plaintiff to show, on that part of the case, that Daniel L. Demmon was authorized, as agent, to make the contract claimed to have been made by him."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

E. R. HOAR and L. M. CHILD, for the defendant.

J. D. LONG, for the plaintiffs.

WELLS, J.

The evidence would warrant a jury in finding that there was an understanding between the plaintiffs and the defendant, that whenever the defendant should sell his own stock he would sell that of the plaintiffs, and that he was authorized to sell

for them at the same price as he sold for himself; that this arrangement or understanding was still subsisting at the time of the transactions in question; and that 56 shares of their stock were transferred by the plaintiffs and delivered to the defendant, through Daniel L. Demmon, for the purpose of being sold in pursuance thereof. Or they might find, independently of any such previous agreement or understanding, that the proposition upon which the plaintiffs parted with those shares was that "certain western parties wanted to buy a majority of the stock," and would give $40 only, and take but 56 shares from the plaintiffs; that the defendant was negotiating a sale to those parties for the plaintiffs and others as well as for himself; and that $40 was named, not as the price of a sale then made to the defendant or to his brother, but as the highest sum that could be obtained from the parties who were proposing to purchase, through the defendant, their several interests.

Upon either of these findings the plaintiffs would be entitled to recover the price for which their stock was in fact sold to those parties; and the instructions to that effect were correct.

It is immaterial whether the facts proved were in strict accordance with the allegations of the special count, because in either aspect of the case the general count for money had and received would be supported.

The jury were warranted by the evidence in finding that Daniel L. Demmon was the agent of the defendant alone; and that the defendant sold and took the proceeds of the shares of the plaintiffs. It is immaterial whether the plaintiffs knew that Daniel L. Demmon was acting as agent for the defendant or not; except so far as it might bear upon the question of fact, to wit: whether there was an absolute sale and delivery by the plaintiffs to Daniel L. Demmon, or whether the delivery was merely for the purposes of a sale to the "western parties."

The admission by the defendant, testified to by Tower, although it did not prove the precise facts relied on to support the action, was competent to be considered by the jury in connection with the other testimony, and may have had some bearing to affect his previous testimony in the case.

The evidence offered to show for what price other persons sold their shares to Daniel L. Demmon, was incompetent to affect the plaintiffs, and was rightly rejected.

Exceptions overruled.

LUMAGHI V. NEUBER.

(57 Illinois, 250. Supreme Court, 1873.)

Owner—Contractor and workman—Implied acceptance. An owner, who was having a shaft sunk by contract, and who kept the time-books and paid off the contractor's men, paid the plaintiff, one of the workmen, about half his claim, and at the same time wrote him out an order on himself for the balance, which order he gave to the plaintiff to have signed by the contractor. The order was not signed for six weeks. The owner had meanwhile paid off the contractor. *Held*, that he was liable on the order, and should have retained sufficient to pay it on his settlement with the contractor.

Appeal from the Circuit Court of Madison County.

This was a suit by Sebastian Neuber against Octavius Lumaghi, to recover for services and upon an order drawn upon him by Henry James.

It appeared that the defendant employed James to sink a shaft for him, and that James employed the plaintiff. The plaintiff was about to quit, when defendant promised to pay him $69.50, the amount then due him, and paid him $35, and gave him an order for James to sign, authorizing the payment of the whole sum. This order was not signed until some six weeks afterward, and the defendant then refused to pay the balance.

A trial was had resulting in a verdict and judgment in favor of the plaintiff for $34.50, from which the defendant appealed.

DALE & BURNETT, for appellant.

DAVID GILLESPIE, for appellee.

By the Court, BREESE, J.

This record presents a clear case for appellee. He did the work, the benefit of which accrued to appellant, and for which appellant promised to pay him after the first of July; the payments were all made by appellant. He had the time accounts, and could know precisely the extent of each laborer's claim. When appellee presented his claim for sixty-nine dollars and a half, appellant did not dispute it, but, on the contrary admitted it and paid thirty-five dollars on it, promising, at the same time, to pay the balance when James should sign the order. No time was specified when the signature of James, to the order which appellant had himself drawn, should be obtained, but the law would require that it should be done in a reasonable time. But it made no difference to appellant when it was signed, for, knowing his promise was out to pay appellee, it was his business to retain that much out of the amount going to James on the settlement with him. His failing to do so should not prejudice appellee. His claim has never been disputed. There is some conflict between appellant's testimony and that of appellee, but we think there is a great preponderance of evidence on the side of appellee, and the jury did right in giving to him the verdict.

The judgment is affirmed.

Judgment affirmed.

THE CHICAGO AND WILMINGTON COAL COMPANY v. LIDDELL.

(69 Illinois, 639. Supreme Court, 1873.)

Statute of frauds—Promise to pay miners' board. It is a sufficient answer to an objection that a contract as set out in the declaration not being in writing, is void within the statute of frauds, to say, the statute was not pleaded. In this case the evidence shows that the contract by the coal company to pay the miners' board was not made with any one of the miners, and was not collateral but primary.

Notice too late, after contract performed. The contract of the coal company with plaintiff could be terminated by either party upon due notice given, but the repudiation of the contract upon pay-day did not destroy the contract.

[1] **Refreshing memory by memorandum.** It is no objection to testimony

[1] *Lawson* v. *Gloss*, 2 Colo. L. R. 481; 6 Colo. 134.

that a witness is permitted to refer to a paper to refresh his recollection, provided he can say he knows the items to be correct because they were true when made and placed in his book.

Appeal from the Circuit Court of Will County; the Hon. JOSIAH MCROBERTS, Judge, presiding.

GOODSPEED & SNAPP, for appellant.

BARBER & MUNN, for appellee.

By the Court, BREESE, C. J.

This was an action of assumpsit, in the Will Circuit Court, brought by Andrew R. Liddell, against the Chicago & Wilmington Coal Company, on a contract to furnish boarding, for certain workmen employed by the company in mining coal. The declaration contained, also, the money counts, and an account stated; the plea was *non assumpsit*, and a trial by jury, who found for the plaintiff. A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which defendant appeals.

The first point made by appellant is, that the contract, as set out in the declaration, not being in writing, was void, as within the statute of frauds. It is a sufficient answer to this objection to say, the statute was not pleaded.

But the evidence shows the undertaking was not collateral, but primary. No contract was made with any one of the miners for board, but defendant undertook, in the first instance, to pay their board, at the rate of five dollars per week, the company having control of the fund out of which it was to be paid.

As to the alleged variance between the contract set out in the declaration and that proved, we perceive no substantial difference. There is no essential variance.

Upon the point that there was no time fixed for the continuance of the agreement, it is conceded either party could terminate it, after due notice given. Such notice was not given. Though the superintendent, Walker, repudiated the payment on the January pay-day, that did not destroy the contract. The company remained liable, notwithstanding this refusal to stop the pay.

The principal objection made by appellant, is, in allowing the witnesses, Liddell, Eggleton and Gray, to testify from the bill of particulars filed in the cause. Liddell testified the bill was made out by one Torrey, employed by him for that purpose, from the book kept by Liddell; that Torrey made it by Liddell reading off the names to him and telling him; and he testifies, "I know when that was wrote, and know it was correct." It was not important he should be able to give the name of each man who boarded at his house, but the number of men and the length of time, in the aggregate, and rate per week, and the total amount due him, was testified to from his own memory. It is no objection to testimony, if a witness is permitted to refer to a paper to refresh his recollection, provided he can say he knows the items to be correct because they were true when made and placed in his book. Liddell had testified he knew the amount was correct.

As to the instructions, we think they were properly disposed of by the court. The whole case shows there was no other declaration before the court, in the trial of the cause, but the amended declaration, which stood as a new declaration, the first count of which is upon the contract.

A careful inspection of the whole record satisfies us that justice has been done, and we must affirm the judgment.

Judgment affirmed.

MORGAN ET AL. V. MCKEE.

(77 Pennsylvania State, 228. Supreme Court, 1874.)

[1] **Oil contracts—Evidence of entirety.** Defendants bought 4,000 barrels of oil from plaintiff, and eight similar papers the same day were executed by them, each calling for the delivery of 500 barrels on the last day of certain consecutive months, payment to be made on each delivery. *Held*, that there were several contracts, and parol evidence was inadmissible to show that at the time of the purchase it was agreed that it was an entire contract, and that the several papers were executed with that understanding and according to the custom of the trade.

[2] **Rescission—Fluctuations in oil—Laches.** Petroleum being an article

[1] *Kennedy* v. *Schwartz*, 2 M. R. 679; *Graver* v. *Scott*, 2 Id. 644.

[2] *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587. *Post* CORPORATIONS.

subject to speculation with the varying market price, a rescission of a contract for its delivery must be made within a reasonable time after grounds of rescission arise. Parties can not take the chance of a rise in the price and elect to deliver or not to deliver accordingly; a month's delay in such case upon a series of contracts for monthly deliveries of oil is an unreasonable time.

[1] **Reasonable time.** Where the facts are not disputed the question of reasonable time is one of law for the court.

Error to the Court of Common Pleas of Allegheny County.

This was an action of *assumpsit*, brought to February term, 1871, of the court below, by John A. McKee against B. W. Morgan and S. A. Morgan, partners as B. W. Morgan & Co.

The plaintiff's claim, as set forth in his declaration and affidavit of claim, was on three similar instruments of writing, all dated March 5, 1870, each of which was for the sale by the plaintiff to the defendants of 500 barrels of petroleum; one for the delivery of 500 barrels between the 16th and 31st days of October, at buyer's option; one for the delivery of 500 barrels between the 16th and 30th days of November; and the third for the delivery of 500 barrels between the 16th and 31st days of December, 1870, to be paid for on each delivery at 30 cents per gallon; with the stipulation in each paper that if no call was made by the defendants, or if the call should be for delivery on the last day, the plaintiff should have the privilege of delivery on either of the last three days. These contracts were accepted by the defendants, and when the plaintiff tendered them the oil on the days stipulated for the delivery, they refused to accept and pay for it.

On the trial, before STARRETT, P. J., February 13, 1873, after the plaintiff's claim had been read, the defendants offered to prove, that on the 5th of March, 1870, the plaintiff and defendants entered into a contract for the sale and purchase of 4,000 barrels of petroleum for the price, etc., as set out in the instruments, above given, and deliverable in monthly quantities of 500 barrels; "that the broker who acted for the parties after the contract was entered into, prepared and had executed eight papers of the tenor of those in evidence, for the delivery of the said monthly instalments; that this was done

[1] *Luckhart* v. *Ogden*, 2 M. R. 609.

merely as a matter of convenience and in accordance with the custom of the trade; that said papers were all executed at one time; that the contract for said 4,000 barrels was one entire contract, and so understood and agreed on by the parties, and the object in preparing and executing said eight papers was not to sever said contract, or to interfere with its entirety, and this was well understood by both parties at the time said papers were signed and executed; that under said contract the plaintiff delivered, and the defendants accepted and paid for 500 barrels of said petroleum in the month of May, 1870, and the like quantity for each of the months of June, July and August, 1870, and upon said oil, so delivered and accepted, the defendants sustained a heavy loss; that the 500 barrels to be delivered by plaintiff to defendants under said contract in the month of September, 1870, were not so delivered, but the plaintiff made default in the delivery, and refused to deliver the same, although it was duly demanded; that the defendants subsequently, to wit, when the October delivery was tendered, notified the plaintiff that by reason of his previous default, the defendants elected to treat the contract as rescinded, and for like reason the defendants declined the subsequent deliveries; that neither the plaintiff nor the defendants would have entered into separate contracts for monthly deliveries, nor would the former have sold, nor the latter have purchased, less than 4,000 barrels of said petroleum, but it was the contemporaneous understanding and agreement when said eight papers were executed, that they constituted one transaction or entire contract for 4,000 barrels; that the papers for the months of October, November and December, in evidence, are three of the eight papers mentioned in a previous part of this offer, and they cover but a portion of the aforesaid 4,000 barrels."

The offer was rejected and a bill of exceptions sealed.

The verdict was for the plaintiff for $5,840.

The defendants removed the record to the Supreme Court, and there assigned the rejection of their offer for error.

M. W. ACHESON, for plaintiffs in error.

A. M. BROWN and T. C. LAZEAR, for defendant in error.

By the Court, WILLIAMS, J.

The offer of the defendants below was rightly rejected, if the evidence proposed to be given would have constituted no defense to the action. In one respect the offer was self-contradictory. It proposed to show that the contract was entire, when by its very terms, as set out in the offer, it was severable as respects its performance by both parties. The petroleum bought by the defendants was not to be delivered at one time for a single and entire consideration, to be paid when the delivery was complete, but it was deliverable monthly by the plaintiff in specified quantities, and the consideration was apportioned and payable as each delivery was made. The contract, therefore, was in its very nature severable: *Lucesco Oil Co.* v. *Brewer*, 16 P. F. Smith, 351; and no understanding or agreement of the parties could render it entire so long as its provisions remained unchanged. If it had been entire and not severable, each monthly delivery for which it stipulated could not have been made, as it was, in the papers executed by the parties, the subject of a distinct agreement, as complete in itself as if it had been a separate and independent bargain. If the defendants sustained a heavy loss as alleged, on each of the four lots of petroleum delivered by the plaintiff, it did not absolve them from their obligation to accept and pay for the residue, if tendered according to the terms of the contract, nor did the plaintiff's failure to make one of the deliveries operate *per se* as a dissolution of the contract and put an end to the rights and obligations of the parties under it. Doubtless it gave the defendants the right to recoup or set off any damages occasioned by the breach, but none were offered to be shown: and if it gave them the right to rescind the contract, they were bound to exercise it without any unreasonable delay. It was their duty to act promptly on the occurrence or discovery of the breach, and if they were guilty of undue delay, they must be regarded as having waived their right to rescind and elected to treat the contract as still subsisting: *Lawrence* v. *Dale*, 3 Johns. Ch. R. 23; *Pearsoll* v. *Chapin*, 8 Wright, 9; *Negley* v. *Lindsay*, 17 P. F. Smith, 217; *Leaming* v. *Wise*, 23 Id. 173. They could not take the chance of a rise in the market price of petroleum, and then elect to rescind the contract or not as might be most for their advantage. They were bound to

make their election within a reasonable time, and what is reasonable time or undue delay where the facts are not disputed, is a question of law to be determined by the court: *Leaming* v. *Wise*, *supra*. Reasonableness in such cases belongeth to the knowledge of the law, and is therefore to be decided by the justices: 1 Tho. Coke Litt. 644 (52 b.) Did the defendants then elect to rescind the contract in a reasonable time? The petroleum was deliverable monthly, and the breach of which the complaint was made, was the plaintiff's failure to make the September delivery. They did not elect or give notice of their intention to rescind the contract until the October delivery was due and tendered by the plaintiff. The court below ruled and we think rightly, that the delay was unreasonable. When the article is a subject of speculation, and the market price varies with the demand and supply, if the purchasers instead of rescinding the contract as soon as it is broken, or within a reasonable time after the occurrence of the breach, take the chance of a rise in the price, it is but equitable and just that they should be treated as having waived the right to rescind. Unquestionably a month's delay in such a case, where the delivery is to be monthly, must be regarded as unreasonable, and should be construed as an election to treat the contract as still subsisting. This view of the case makes it unnecessary to determine whether there was such a material variance between the offer and the contract declared on as to render the evidence inadmissible. If the contract, as offered to be shown, had been incorporated into one instrument or paper, instead of eight, as executed by the parties, the evidence proposed to be given would have constituted no defense to the action, and therefore its rejection did the defendants no harm.

Judgment affirmed.

THE MANGANESE IRON ORE COMPANY v. TROTTER.

(29 N. J. Eq. 561. Court of Chancery, 1878.)

Order concerning use of tunnel—Power of court to vary terms of contract. An order of court determined the rights, under contract, of

the M. I. O. Co. and of Trotter to the use of a tunnel, by which Trotter's rights were declared to be superior to those of the company, but the latter was declared to have the exclusive right to the tunnel for a certain period in each year for the purpose of mining zinc ores, and as a necessary incident thereto of removing franklinite, although its contract called for zinc alone, while Trotter's called for franklinite. The order was based upon the mistaken idea that the supply of franklinite was very large. *Held*, that a further exercise of the incidental right to remove franklinite by the M. I. O. Co. would deprive Trotter of the benefit of his contract, and that he could not be compelled to accept an offer from the M. I. O. Co. of one half the quantity of franklinite he was authorized to take, on payment for the cost of mining it. A court has no power to engraft new provisions upon a contract against the will of one of the parties.

Petition by defendant for change in the plan of management of a tunnel.

R. W. PARKER and C. PARKER, for defendant.

R. GILCHRIST and B. WILLIAMSON, for complainants.

THE VICE-CHANCELLOR.

The rights of the parties to this controversy, under their several contracts, have already been defined by this court: *Silsby* v. *Trotter*, 2 Stew. 228.[1] The present complainants claim to have succeeded to the rights of the complainant in the original cause. For present purposes that claim may be assumed to be true without prejudice to the defendant. The rights of the parties, as already determined by the judgment of the court in the original cause, are: First, that both parties are entitled to the use of the tunnel, but the right of the complainant is subordinate to that of the defendant; second, that until the complainant is able to furnish the defendant with the zinc ores he is entitled to under the contract of April 28, 1874, and until he gives him notice of his election to do so, the defendant has an exclusive right to the use of the tunnel so long as his operations in the mine render the exclusive use of the tunnel necessary to him; third, that when the complainant is able, and has notified the defendant of his election to mine and furnish to him the zinc ores he is entitled to under the contract of April 28, 1874, he will be

[1] *Post* 137.

entitled to the exclusive use of the tunnel for the purpose of furnishing those ores, and for that purpose only, for such time in each year as shall be necessary to afford him a fair opportunity to furnish to the defendant the quantity of ore deliverable to him in that year; fourth, that at all times when the defendant's mining operations do not render the exclusive use of the tunnel necessary to him, the complainant shall be permitted to use it to such extent as will not interfere with the defendant's use of it; fifth, that whenever the defendant shall suspend work temporarily, or his mining operations do not render the use of the tunnel necessary to him, the complainant shall, for such period as the defendant does not need its use, have the entire use of the tunnel.

An order declaring the rights of the parties in conformity to the foregoing determination, was made January 15, 1878, and immediately thereafter the present complainants, and also the complainant in the original cause, gave notice of their election to mine and furnish the zinc ores the defendant is entitled to under the contract of April 28, 1874. On the 23d of February, 1878, a manager was appointed with direction to permit the Manganese Iron Ore Company to have the exclusive use and possession of the tunnel and other mining tools, for the purpose of mining and making delivery to the defendant of the zinc ores he was then entitled to, such use and possession to continue only for such period of time as, in the judgment of the manager, was reasonably necessary for the purposes stated.

The manager took possession, March 14, 1878. Since then the complainants have mined and removed over four thousand tons of franklinite, and about one hundred and fifty tons of zinc. A small additional quantity of zinc, estimated by the manager at less than sixty tons, is now accessible, and can be removed in a few days. After that is removed, before any other zinc can be safely mined in this mine, it will be necessary, in the judgment of the manager, to remove a quantity of franklinite nearly equal to that already removed. The defendant asks that the further removal of franklinite by the complainants be arrested, and that he be let in at once to the mine and remove the quantity he is authorized to take. His contract of September 14, 1876, grants him the right to

mine and take "from either side of the tunnel constructed by him," forty thousand tons of franklinite. There can be no doubt that the franklinite now being removed is the very ore covered by his contract, and which he and his licensors had in mind when the contract was made. His license is not a roving privilege, giving him a right to take the ore wherever he can find it, nor does it confer upon his licensors a paramount right to that found on either side of the tunnel, nor power to compel him to explore elsewhere on the territory covered by his license for his forty thousand tons. The affidavits before the court on this application render it quite certain that the quantity of franklinite remaining on either side of the tunnel, as at present constructed, is less than the defendant is entitled to. When the manager was appointed, the court believed the mine or excavation then opened contained many hundred thousand tons of franklinite. The bill and affidavits were understood to represent that to be the fact. The affidavit of the person who had superintended all the mining operations of the complainant, stated that he had "stripped and exposed to view, in a space of one hundred and ten feet in length, above the tunnel, at least from sixty to seventy thousand tons of franklinite." It is now clearly demonstrated that the direction to the manager was based on an erroneous estimate of the quantity of franklinite then accessible from the tunnel, and that if the complainants are continued in the exclusive possession of the tunnel, and permitted to mine and remove the franklinite necessary to be removed to reach the zinc, so that it may be safely and properly mined, the defendant's right to take forty thousand tons of franklinite, at the point where it is first found, on either side of the tunnel, will be at least partially defeated. As already stated, the direction to the manager was given under the belief that the deposit of franklinite was very large, and it was also believed that the removal of so much of it as was necessary to render the zinc easily accessible, even if it reached fifteen or twenty thousand tons, would not in the slightest degree impair the defendant's right, for even after the removal of that quantity, it was supposed much more would still remain than he was authorized to take. Against this method of management no objection suggested itself to the court except the delay that

would ensue to the defendant in working under his license, but as that could continue only for a short time, and as it did not appear that he had made a market for a single ton of franklinite, it did not seem possible that he could suffer very serious injury. But the facts now before the court very materially change the condition of affairs. Less than forty thousand tons of franklinite remain; by the judgment of the court the defendant has the superior right to the use of the tunnel, for the purpose of mining and removing that quantity of ore, on condition that he works the mine to the full extent of its capacity; the complainants were given the exclusive use of the tunnel for the purpose of mining zinc for the defendant, and for that purpose only, but as a matter necessarily incidental to the accomplishment of that purpose, they have been permitted to mine and remove franklinite. A further exercise of this incidental right will materially diminish the quantity of ore the defendant has the paramount right to take by means of the tunnel. In view of these facts, it is plain a continuance of the present plan of management will deprive the defendant of the benefit of both his contract and the judgment of the court. That can not be permitted. The court must protect and preserve, and neither withhold or destroy, nor permit to be withheld or destroyed.

The complainants offer to furnish the defendant with half the quantity of franklinite he is authorized by his contract to take, on being paid or credited with the cost of mining on what they owe the defendant for constructing the tunnel. An offer of the whole quantity, on the condition named, would seem to be manifestly fair; if that was the offer, and the court had power to make a new contract for the parties, I would be inclined to coerce the defendant's acceptance; but the right and liberty of making contracts belong alone to the parties. While it is true this is purely a matter of administration or regulation, and the court may therefore exercise a wide discretion, still it must also be observed it is an administration or regulation of rights secured by contract, and that the court is as much bound by the contracts as the parties themselves. A right to mine and furnish zinc was reserved and may therefore be exercised; a right to mine and furnish franklinite was not reserved, and can not therefore be exercised, even un-

der the authority of the court, unless it has power to ingraft a new provision upon the contract against the will of one of the parties. No department or agency of government possesses any such power.

An order will be advised directing the manager to have the zinc now accessible mined and removed as soon as it can be done, and immediately thereafter permit the defendant at all times when his mining operations render the exclusive use and possession of the tunnel and other mining tools belonging to him necessary to him, to have the exclusive use and possession thereof for the purpose of mining and removing franklinite until a sufficient quantity of franklinite shall, in the judgment of the manager, have been removed to make it safe and proper to mine and remove zinc, when the complainants shall again, if they desire, be permitted to have the exclusive use of the tunnel, so far as may be necessary, for the purpose of mining and removing zinc for the defendant. The defendant's use and possession of the tunnel must be such only as were awarded to him by the order of January 15, 1878, and the complainants will have a right to use it when the defendant does not require the use of it, or when their use of it will not interfere with the defendant's use of it.

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[1] SILSBY V. TROTTER.

(29 New Jersey Equity, 228. Court of Chancery, 1878.)

License to take ore. A contract which merely grants a right to take ore, no estate or interest being granted, is simply a license, but if coupled with an interest growing out of expenditures made pursuant to its requirements, the license can not be revoked at the pleasure of the licensor. Such a license is not exclusive of the licensor, unless expressed in such words as to show it to be the intention of the parties, or unless the implication is so clear and strong as to be unavoidable.

Licensee's rights to use of tunnel. One who constructs a tunnel for the purpose of mining ore under a license from another with an understanding that he is to be reimbursed for his outlay from the licensor's share of the ore mined, has the right to the exclusive use of the tunnel, by implication, if in the exercise of reasonable diligence such exclusive

[1] See *Manganese Co.* v. *Trotter*, ante 133.

use is necessary to enable him to mine the quantity of ore named in the license within the time limited.

On motion to dissolve injunction, heard on bill, answer and affidavits.

R. WAYNE and CORTLANDT PARKER, for motion.

ROBERT GILCHRIST, *contra.*

THE VICE-CHANCELLOR.

The dispute in this case grows out of conflicting claims made by the litigants to the use of an adit or tunnel leading to a deposit of franklinite ore, in Stirling Hill, Sussex county, which both claim a right to mine and remove by means of the adit or tunnel. Both parties derive their rights from the Franklinite Steel and Zinc Company. The question of the case is, what is the extent of the rights of the respective parties in the adit or tunnel? The defendant's rights arise out of the following contracts: On the 28th of April, 1874, the Franklinite Steel and Zinc Company, by writing, gave the defendant, Mr. Trotter, the right and privilege, for seven years from that date, to enter into and upon the lands containing the ores which both parties claim a right to dig and take, for the purpose of mining and taking therefrom ten thousand gross tons of carbonate of zinc, silicate of zinc and red oxide of zinc, at least one seventh of the whole quantity to be mined and taken in each year. Mr. Trotter agreed to pay $10 a ton, and also to open and work the mine properly, and mine the ores at his own cost and expense, but it was further agreed that such cost and expense should be deducted from the price of the ores. The agreement further provides, that the tools, implements and property used in opening and working the mine shall be the property of the corporation, and that they shall be entitled to the possession of them when Mr. Trotter ceases to have a right to work the mine; and that Mr. Trotter's operation shall be conducted under the direction of a mining engineer selected by the corporation. The corporation reserves the right to mine and furnish the ores to which Mr. Trotter is entitled, in which case no deduction for the cost and expense of mining is to be made from the price; and they also re-

serve the right to work the mine concurrently with Mr. Trotter, when their working will not interfere with his. It is further stipulated, that a failure by Mr. Trotter to keep his covenants shall, at the option of the corporation, work a forfeiture of his rights under the contract.

By a subsequent contract, bearing date November 4, 1875, Mr. Trotter is given the right and privilege to take, in addition to the quantity specified in the first contract, ten thousand tons of zinc ore, of the same kind mentioned in that contract, and at the same price; and he is also given four years additional time within which to mine and remove it, with a proviso that he shall mine and remove one fourth of such additional quantity in each of the four additional years.

By another contract, bearing date September 1, 1876, Mr. Trotter is given the right, for the period of one year from that date, to mine and sell, or mine and manufacture, silicate of zinc taken from the mine and tunnel, and, as a consideration for such right, he agrees to keep accurate accounts of the value of the ore, and of the costs and expenses, and ascertain and divide the profits equally between the corporation and himself, and to credit the corporation's share of the profits on their portion of his expenditure on account of the mine. By a recital in this contract, the corporation admits the contract of April 28, 1874, had been performed by Mr. Trotter, so far as it was practicable for him to do so.

By a further contract, bearing date September 14, 1876, the corporation give and grant unto Mr. Trotter the right and privilege of entering into and upon the same lands described in the first contract, and into, through and from either side of the tunnel made by him there, to mine and take out forty thousand tons of franklinite ore; and, in consideration of such grant, Mr. Trotter binds himself to furnish all the labor and capital necessary to mine and sell the forty thousand tons of ore, to keep accurate accounts of his transactions, to make an advance of $1,950 to the corporation at stated periods, and to ascertain and divide the profits equally with the corporation, paying part of their share to them at periods specified, and applying another part to the amount due to him for the construction of the tunnel, and to reimburse him for his advances.

It will thus be seen that Mr. Trotter's rights were: first, to

take ten thousand tons of three different kinds of zinc ore—carbonate, silicate and red oxide—within seven years from April 28, 1874, one seventh, at least, of the whole quantity to be taken in each year; second, to take ten thousand tons additional, of the same kinds of zinc ore, during the four years immediately succeeding the expiration of the seven, one fourth of the additional quantity to be taken in each of the four years; third, to take any quantity of silicate of zinc which he could mine and sell, or mine and manufacture, during a period of one year from September 1, 1876; fourth, to take from either side of the tunnel forty thousand tons of franklinite; and fifth, to be reimbursed for his advances to the corporation, and to be paid for certain outlays made by him in opening and working the mine.

On the 22d of March, 1877, the Franklinite Steel and Zinc Company made a lease to the complainant, whereby they granted and demised to him, for a term of twenty-one years, all the veins, lodes and beds of franklinite contained in, upon and beneath the surface of the lands described in the contracts with Mr. Trotter, and also in, upon and beneath the surface of other lands, and all the spurs, dips and angles of said veins, lodes and beds of franklinite; and also, all their estate, right, title, interest, property, claim and demand of, in and to the same; but the lessors expressly reserved rights and privileges of precisely the same nature and to the same extent as are held and possessed by Mr. Trotter under the contracts of April 28, 1874, and September 1, 1876; and, also, all the rents, issues and profits which might or should arise out of the rights and privileges so reserved.

Prior to the execution of the lease to the complainant, Mr. Trotter, under his contracts with the corporation, had, in opening the mine, constructed, under the direction of a mining engineer selected by the corporation, the tunnel in controversy, at a cost, as he claims, of over $15,000, and laid a railroad track upon its bed. It is used as a way to and from the mine, principally for the transportation of ore from the point where it is separated from the vein or deposit to the place of shipment. It is not the only means of access to the mine; in addition to it, there is a pit or hole, extending from the surface to the mine, seventy feet in depth and twenty by thirty feet

in area. The complainant says this pit or hole was made several years ago in mining franklinite, and is now used for light and air, and that it would not be a practical way of mining to raise ore through it.

On the 3d of May, 1877, on a bill alleging that Mr. Trotter was exercising his privileges slothfully and inefficiently; that he was not working the mine nor using the tunnel to the full extent of their capacity, and that both could be operated much more extensively without interfering with Mr. Trotter's operations; that the complainant had made market for a large quantity of franklinite at remunerative prices, which he would lose if he was excluded from the mine and prevented from using the tunnel; that he had earnestly but unsuccessfully endeavored to effect an amicable arrangement with Mr. Trotter, who, in a spirit of mere perversity had refused to allow him to use the tunnel to any extent whatever, an injunction was granted, enjoining Mr. Trotter from preventing the complainant from using the tunnel contemporaneously with him, to such extent as would not interfere with him in conducting mining operations similar in extent to those theretofore carried on by him. Mr. Trotter has answered this bill, and now moves to dissolve the injunction.

The contracts merely grant a right to take ore; no estate or interest is granted; and therefore they simply give a license, but it is a license coupled with an interest growing out of expenditures made pursuant to its requirement, and it can not therefore be revoked at the pleasure of the licensor.

The authorities are agreed that a license to dig and take ore is never exclusive of the licensor, unless expressed in such words as to show that that was the intention of the parties. Where the license simply gives the licensee the right to dig and take ore, the licensor may take ore from the same mine, at the same time, and also grant permission to others to exercise the same right. This seems to have been the prevailing rule upon the subject since *Mountjoy's Case*,[1] decided during the reign of Queen Elizabeth, of which several, not entirely harmonious, reports have been preserved. The curious may find them in Anderson, 307, 4 Leonard, 147, Co. Litt. 164 c Godbolt, 17, and Moore, 174. In that case such license

[1] *Post* LICENSE.

was held to be like a grant of common *sans nombre*, which never excludes the grantor from enjoying the common with his grantee. In *Chetham* v. *Williamson*, 4 East, 469, 476, Lord Ellenborough declared, "a liberty reserved of digging coals could not give the person reserving it the exclusive right to them. No case can be named where one who has only a liberty of digging for coals in another's soil, has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." And in *Grubb* v. *Bayard*, 2 Wall. Jr. 81, where the license gave the licensee the right to dig and carry away all the iron ore to be found in certain designated lands, it was held there was no grant of the ore, but the licensee merely had the right to take away so much as he might dig. The word "all" was held to show merely the extent of his license as to quantity; he was at liberty to dig all the ore there was in the land, but he acquired no title to any until he separated it from the freehold. His license conferred a right without stint as to quantity, but like a grant of a right of common *sans nombre*, it did not exclude the grantor. Views identical in substance are expressed in *Funk* v. *Haldeman*, 53 Pa. St. 229, and in *Stockbridge Iron Company* v. *Hudson Iron Company*, 107 Mass. 290, 322. The latest statement of this doctrine, by an English judge, I have been able to find, is by Lord Justice Page Wood, in *Carr* v. *Benson*, L. R. 3 Ch. Ap. 524. He says: "It has been held from the earliest period, that a man taking a license where he is under no obligation to work, can not exclude his licensor from granting as many more licenses as he thinks fit; provided, always, that they are not so granted as to defeat the known objects of the first licensee in applying for his license."

Upon these authorities I take it to be entirely clear that Mr. Trotter did not acquire an exclusive right to the occupancy of the mine. The more difficult question is, what are his rights in the tunnel? It must be regarded as a way to the mine. Had Mr. Trotter built it at his own cost, under the authority of his license, I think his right to the use of it would have been exclusive, so long at least as it was necessary for him to have the exclusive use of it to carry out his purpose in constructing it. Though there had been no ex-

press stipulation to that effect, such an exclusive right would have arisen by unavoidable implication from the very nature of the transaction. No sensible man would incur such an expenditure unless he understood his rights were to be exclusive, and no honest man would encourage so large an outlay unless he intended that the person making it should have the exclusive enjoyment of it, so long at least, as it was necessary to enable him to accomplish his purpose in making it. But that is not the case presented for judgment. While Mr. Trotter furnished all the capital expended in the construction of the tunnel, it was advanced by him as a loan to his licensors; he is entitled to reimbursement. This right is secured by the contracts and fully admitted in the bill. It must be conceded, then, the tunnel was built by Mr. Trotter for his licensors, and constituted part of the "tools, implements and property used in opening and working the mine," which under the contract of April 28, 1874, became their property, subject, however, to an exclusive right of possession in Mr. Trotter, provided the extent of his operations made such possession necessary and his licensors did not elect to mine and furnish him with the ores he had a right to take. That contract provides that "the tools, implements and property used in opening and working the mine shall be the property of the party of the first part, which party shall be entitled to the possession of the same when the party of the second part shall cease to have any right to work the mine under the contract; the party of the first part reserves the right to mine and furnish to the party of the second part, the ores he is authorized to take under the contract, and also the right to work the mine, whenever by so doing it will not interfere with the actual working thereof by the party of the second part." It is obvious, I think, the right to work the mine must be defined to be not merely digging ore, but removing it from the mine, so that the licensors have, under this reservation, the right to use the tunnel whenever their use of it will not materially obstruct the use of it by the licensee; but I think it is equally clear, that the parties intended that the licensee should have a right, if his operations required it, to absorb the whole use of the tunnel, and in that case that his possession should be exclusive. This construction is made abso-

lutely necessary by the stipulation that the licensors' use of the tunnel shall be only such as will not interfere with the use of it by the licensee. Precedence and superiority of right are conceded to the licensee. Although the two subsequent contracts, the first dated November 4, 1875, and the second, September 1, 1876, relate to the same kind of ores, and in a certain sense may be considered supplemental to the first, yet it is important to observe they contain no reservation giving the licensors a right to furnish ore to the licensee, and there is nothing apparent on their face from which such right can be implied. The last, the license to take franklinite, contains no reservation authorizing the licensors to furnish ore in the place of that which the licensee is authorized to take. Unlike all the others, the time within which the licensee is to take the forty thousand tons of franklinite is not limited by express words, but while this is so I think it quite clearly appears from those portions of the contract which require monthly advances to be made to the licensors, upon which they are to be charged interest, and which also provide for the payment of those advances and the cost of the tunnel out of the licensors' share of the profits, and designate when the profits shall be divided and paid; that the parties intended and distinctly understood that the mine should be worked continuously to its full capacity, so long as a remunerative market for the ore could be had. It was an arrangement for working the mine for the reimbursement of one and for the profit of both, which could not be made fully and presently effectual unless the mine was worked to the full extent of its capacity.

If such is the true construction of the contract—and that in my view, is the interpretation it must receive—there can be no doubt, I think, that Mr. Trotter's right to the use of the tunnel must be held paramount and exclusive, so long as he works the mine to the full extent of its capacity. Any other view would defeat the purpose of the contract as to the one party or the other. If, in this case, the licensors had first constructed the tunnel at their own cost, and then, for a sufficient consideration, granted a license authorizing the licensee to take a certain quantity of ore within a time limited, and it appeared the licensee could not get the full quantity of ore

he was entitled to, within the time designated, unless he had the exclusive use of the tunnel, I take it to be entirely clear his right, in that case, would be held to be exclusive. If it were not, it would always be in the power of a licensor to defeat his grant, even when his license was coupled with an interest, or founded on a good consideration. An exclusive right to mine may be raised by implication, but it must be so clear and strong as to be unavoidable: *Funk* v. *Haldeman*, *supra*.

The complainant occupies the same position here his lessors would were they seeking judicial aid. The lease gave him full notice of the rights and privileges of the defendant, and he can claim no equity which his lessors could not have invoked had they been the complainants.

So far as the present record shows, neither carbonate of zinc nor red oxide of zinc has been found, but a very large quantity of franklinite has been discovered. Silicate of zinc has also been found, but the defendant says its quality is so poor as to render it nearly worthless as a mineral. The bill and affidavits show the mine contains many hundred thousand tons of franklinite. That is the chief subject-matter of the strife, and the tunnel is mainly valuable now to the parties because it affords a convenient way for removing the ore from the mine to the place of shipment.

My conclusions are:

First. That both parties are entitled to the use of the tunnel but the right of the complainant is subordinate to that of the defendant.

Second. That until the complainant is able to furnish the defendant with the zinc ores he is entitled to under the contract of April 28, 1874, and until he gives him notice of his election to do so, the defendant has an exclusive right to the use of the tunnel so long as his operations in the mine render the exclusive use of the tunnel necessary to him.

Third. That when the complainant is able and has notified the defendant of his election to mine and furnish to him the zinc ores he is entitled to under the contract of April 28, 1874, he will be entitled to the exclusive use of the tunnel for the purpose of furnishing those ores, and for that purpose only, for such time in each year as shall be necessary to afford him

a fair opportunity to furnish to the defendant the quantity of ore deliverable to him in that year.

Fourth. That at all times when the defendant's mining operations do not render the exclusive use of the tunnel necessary to him, the complainant shall be permitted to use it to such extent as will not interfere with the defendant's use of it.

Fifth. That whenever the defendant shall suspend work temporarily, or his mining operations do not render the use of the tunnel necessary to him, the complainant shall, for such period as the defendant does not need its use, have the entire use of the tunnel.

The injunction must be so modified as to conform to the foregoing conclusions. If it becomes necessary for the protection of the parties in the enjoyment of their respective rights as herein defined, a manager of the tunnel will be appointed.

No. 5 MINING CO. v. BRUCE ET AL.

(4 Colorado, 293. Supreme Court, 1878.)

Jury of six. In the trial of issues of fact in the County Court of Colorado under statute of Feb. 13, 1874, p. 213, a party who desires a trial by a jury of twelve must demand a jury of that number before the *venire* is issued, and if the record fails to show such demand, or a waiver of any jury, then a trial by a jury of six will be proper.

Timbering shaft voluntary. In an action upon a contract to sink a mining shaft a certain number of feet at a specified sum per foot, without any specific agreement for timbering, *held*, that in the absence of proof of a custom requiring such work in sinking a mining shaft, the quality of the timbering would not be considered, that being no part of the contract, but purely voluntary.

Evidence of several contract on joint suit. If one is bound by contract to two persons severally, and only severally, their interests being also several, they can only sue upon it severally, and in a joint action they will not be permitted to introduce evidence of a several contract.

Misleading instruction. It is error to give an instruction which is sound as a proposition of law, if there is no legal evidence on which to base it. Such an instruction is misleading.

Error to County Court of Clear Creek County.

In the trial of this cause in the County Court the record discloses the following evidence:

Bruce, one of the plaintiffs, testified: "Horton and I took contract for one hundred feet sinking at $20 a foot with water stipulation; defendant was to pay expenses for the water; sank sixty-one feet and timbered; date of contract was October; commenced sinking October 20, 1875; worked until December 20, 1875; sank twenty-five feet and stopped to work in engine room; was told to do what was necessary to receive machinery; to do extra work necessary for hoisting; they agreed to put in machinery, as soon as it was necessary, for hoisting; we were to receive $4 per day, each; he engaged us jointly; there is $332 due for days' labor, my own individual time; Horton's amounted to $258; the shaft at this time was forty-five feet; day-work began in December; resumed sinking in May; sank two days in May; quit July, 1876; received on account $1,433, including labor and contract; balance due is $795; were to be paid monthly on contract; got money we did get, as we could; got last payment July, 1876—$213.50—the monthly installment; the balance stated was then due during the first week of July, 1876; it had never been paid up according to contract since we commenced; we didn't sink shaft the depth agreed on because we were not able to carry it on—we hadn't the money."

Cross-examination: "During July we were laid up on account of broken machinery; during first three months of contract kept six men at work; Teal didn't request to keep back 25 per cent. of contract money, it was not the agreement; whole contract was verbal; we worked on the sinking together and the days' wages together; up to December we had sunk twenty-four feet, and the water expenses were $31.50; in December, eleven feet, water expenses were $42; water expenses in May were $341; we checked the time bailing; Teal was superintendent of the company; was down in the shaft once, saw our timbering, and said that would do; he told us to hire men to put in the machinery, and on water expenses, and he would pay the bill; we employed the men to work for the company; they told us to do the extra work; it had to be done."

Horton, plaintiff, after stating, in substance, same as Bruce,

testified: "they owed us for sixty-one feet on the contract at $20 per foot, $1,220; for work done by the day by me, $258; by Bruce, $332."

Cross-examination: "We based the charge for water expenses on inconvenience and loss of time; states the quantity of water; we drained the Equator shaft, that is what made the water so great; we estimated the water increased our work one half; defendant accepted our work and agreed to pay; I had my own days' wages, and I think Bruce put in both bills; each kept his own money."

Motion to strike out all evidence of days' wages, first testified under objection, by said Bruce and said Horton; motion overruled; exception.

Simmons, sworn for defendant, testified as to contract and payments to plaintiff of balance due, $137, including $50 which directors agreed to allow for water; "for days' work there is still due Horton $200, Bruce $128; plaintiffs were employed to work by the day; orders were to employ them individually."

Cross-examination: "Am secretary of the company; they had been at work three months before Hambel and I were authorized to act for the company."

George Teal, sworn for defendant: "Was director; proved custom for contractor to take care of water; examined the shaft; proved defective work; some timbers were crushed in and broken; I can not give an estimate in figures; the superintendent should not have allowed it to be done as it was; plaintiff presented bill at Hall's office; they brought in a claim for water expenses; it was repudiated; James Teal there read a statement of contract in their presence; don't know what objections were made; the agreement was, 25 per cent. was to be kept back.

G. W. Hall, sworn for defendant: "Examined shaft; timbers broken and work badly done; have already spent from $300 to $400 to secure it; will have to be re-timbered; it will cost at least $700 in work, besides the timbers to repair; I am president of the company."

William M. Treglone, sworn for defendant, stated: "That timbering put in by Bruce would have to be replaced on account of bad workmanship; to replace will cost double the price of original timbering."

Admitted in writing that if James Teal were present he would swear that, on the contrary, plaintiffs were to take care of the water at their own charges.

J. T. Horton, recalled, proved that James Teal, superintendent of the work, was in the shaft several times, and that the work had been accepted by the company; he found no fault with the work; he was superintendent for the company.

The jury found for the plaintiffs, assessing their damages at $427, for which amount judgment was rendered. And thereupon the defendant below sued out this writ of error.

R. S. Morrison and G. G. White, for plaintiff in error.

W. T. Hughes and L. C. Rockwell, for defendants in error.

Stone, J.

This action was brought by defendants in error, in *assumpsit*, to recover for work done in sinking a shaft on the mine of the plaintiff in error, upon a verbal contract therefor. The general issue was the only plea of the defendant below, on which issue was joined at the trial.

The first point made by the plaintiff in error that we are called upon to notice, is that the case was tried by a jury of six, without waiver of the right to a jury of twelve.

The third section of the act amendatory of the law relating to probate courts, approved Feb. 13, 1874, declares that, "all issues of fact in said probate courts shall be tried by a jury of six men, unless both parties waive a trial by jury," etc. Section four of said act further provides that, "If at any time before the calling of the cause for trial, and before any *venire* shall have issued, either party shall demand a trial by a jury of twelve men, a jury of twelve men shall be summoned and impanelled, but the party demanding the same shall be required to advance and pay into court the sum of twenty dollars at the time of making such demand." A proper construction of these two provisions of the statute in force at the time, seems to imply that the trial shall be had by a jury of six men, unless a trial by jury shall be waived by both parties, or unless one party or the other shall demand a trial by a jury of twelve. The record in this case

does not show that a jury was waived, nor that a jury of twelve was demanded by either party, and the case was therefore properly tried by a jury of six.

The statute referred to authorizes the issuing of a special *venire* for a jury in such cases, and hence the fourth error assigned is unsupported.

The first, second, fifth, sixth, tenth, eleventh and twelfth assignments of error appear to have been waived by counsel for plaintiff in error, and are not argued in their briefs, so that the only alleged errors remaining to be noticed arise out of the giving and refusing of instructions.

Since there was no motion for a new trial in the court below, the evidence is not before us for the purpose of determining whether it supports the verdict or not, and we have therefore examined it only for the purpose of determining the character of the instructions in question.

The seventh assignment of error is that the court erred in refusing to give to the jury the following instruction, prayed by plaintiff in error, to wit:

"The court instructs the jury that every contract to do work and labor is presumed to be a contract to do such work and labor in a good and workmanlike manner, unless the contrary is proved, and if the jury find from the evidence that the work of timbering in this case was not done in a good and workmanlike manner, the jury should allow against the plaintiff's claim the amount expended, or which must yet be expended, to make it a good and workmanlike job."

The first clause of this instruction is undoubtedly true as a rule applicable to contracts for works, but the latter portion depends for its correctness upon the state of facts disclosed by the evidence.

Neither the contract as set out in the pleadings, nor the evidence, shows that there was any agreement that defendants in error were to timber the shaft. It was a naked agreement to sink a shaft so many feet for so much money per foot. Had the contract specifically required the defendants in error to timber the shaft, they would of course have been bound to do such work in a good and workmanlike manner, but in the absence of such agreement, or in the absence of

proof of custom requiring such work in sinking a mining shaft, we are left to infer that such timbering by defendants in error was voluntary on their part, and for the purpose of protecting themselves in their work, and whether permanent or temporary, good or bad in its character, it in no way affected the contract for sinking the shaft.

Under this state of facts shown by the testimony, the instruction was inapplicable and erroneous, and was therefore properly refused.

The errors alleged in the eighth and ninth assignments are for the giving of the two following instructions:

"The court instructs the jury that if the Number Five Mining Co. agreed to pay the plaintiffs for sinking down, and the expenses in bailing water, etc., monthly installments for the same, and failed to do so, then the plaintiffs were justified in giving up the job, and may collect from the defendants any and all moneys reserved by the defendants as a forfeiture."

"The court further instructs the jury that if the defendant hired the plaintiffs jointly to do the work in the chamber by the day, they will find for the plaintiffs for at least the amount that the defendant admitted to be due the plaintiffs."

The first of these instructions was perhaps unnecessary, since no defense seems to have been made on the ground that the "job" was not completed, and the reservation of twenty-five per cent. of the amount due for work, as it accrued monthly, does not appear to have been made on that account.

The second instruction has reference to extra work done in excavating an engine room or chamber, and for which plaintiff in error agreed to pay by the day. As to the correctness of this instruction, I disagree with the majority of the court, and hence state my own views and conclusions upon the point involved.

Bruce, as witness, testified that the defendants in error were engaged jointly to do this work, at the price of four dollars a day each. The secretary of the company testified that there was yet due on this work, "Horton, $200; Bruce, $128." That is to say, there was admitted to be due $328, of which $200 was for day's work done by Horton and $128 for like work done by Bruce, aside from the contract for work in sink-

ing the shaft. I can see no difference between this manner of keeping the account with respect to the work done by the contractors themselves, and what would have been the case if the contractors had hired other men to do the same work. The plaintiff in error would in either case be bound to pay the amount due for all the days' work, leaving the contractors to divide it between themselves, as they chose, or as they were respectively entitled to it. It is sometimes not without difficulty that a line of distinction can be drawn between contracts that are joint and those that are several in their nature. Occasionally a contract seems to partake of both natures; and again a contract is found which is joint in its main scope and object, but which contains one or more covenants that are several, or *vice versa*.

I understand a difference to exist between an interest which is common and one which is joint; and that where parties have a *common* interest in the claim made in an action they *may* join as plaintiffs, but where they have a *joint* interest they must so join. For instance, tenants in common may maintain a joint action for rent due under a lease of the joint estate, all the covenants in which are *with them* jointly, although by an agreement, annexed to the lease and made a part thereof, it is stipulated what portion of the rent shall be paid to each: *Wall* v. *Hinds*, 4 Gray, 256. On the other hand, where a deed is executed by several grantors jointly, but their interests in the premises conveyed are distinct and several, any one of them may bring his separate action for his share of the purchase money: *Leake* v. *Brown*, 43 Ill. 372. But it would be otherwise, I take it, if the interest so conveyed were undivided or joint.

If the parties to a contract have a joint interest in the fulfillment of the contract, and sustain a joint damage by a breach of the engagement they had entered into, they must all bring a joint action: *Wright* v. *Post*, 3 Conn. 142; and this, too, although the terms be several, or joint and several: *Capen* v. *Barrows*, 1 Gray, 376; 1 Chit. (Pl. 16th Am. ed.) 9 and note *y;* and 11 note *n*, and cases cited. Where plaintiffs sue as joint contractors, they, as a general rule, undoubtedly must show a joint interest in the subject-matter of the suit, and as to the general rule of pleading

as to joint and several actions, applied to those, distinctly as such, I do not differ with my learned brethren. I regard this case as one of a class *sui generis*, perhaps, where the principal contract is essentially joint, although some of the incidents are several as relating to some of the parties. The main contract here was for the sinking of a shaft which plaintiffs below jointly contracted to perform. The work of excavating for the engine room was an incident of the former, and the necessity for it arose out of the principal contract. Hence they may be said to have been jointly interested in the fulfillment of the subsidiary contract for this work, as a necessary part of the other, although from the obvious difficulty of estimating the cost of this work in the same manner as for the sinking of the shaft, the mode of payment was fixed to be by the day; at least such interest was a common one; and I can not think it would be doing violence to the rules of pleading and practice to allow the contractors to join in a single action for the price of their whole work, notwithstanding the price was to be differently computed for the different parts. If the work of excavation for the engine room had been the sole contract, or if, pending the work on the shaft, the plaintiff below had engaged to go out and chop cord wood or herd cattle for the company by the day, I concede, of course, that such distinctly several contracts would create separate causes of action; but the construction of the engine room was, as I infer from the evidence, for the purpose of placing an engine to hoist material out of the shaft they were sinking, and this work was inseparable from the other. Entertaining this view of the legal question presented, and considering that there was no dispute as to the amount due for this part of the work done by the day, either between the parties plaintiff and defendant, or between the plaintiffs themselves, and that it was only withheld by the company on the ground that the contract for sinking the shaft was not fulfilled, thereby treating it as a part of the entire contract, I think that to hold that a severance was necessary, and send this case back, thereby compelling each of the defendants in error to bring a separate suit for that part of his wages which is undisputed, involving three suits where, in my opinion, one would suffice, seems to me a refinement calculated rather to obstruct than to facilitate the administration of justice.

THATCHER, C. J.

With the conclusions reached by Brother Stone, upon the several assignments of error, except that which relates to the right of the plaintiffs to recover in a joint action for the extra work, I am in accord. But I do not agree that the amount due each of the plaintiffs for such extra work was properly admissible in the joint action. The contract with the plaintiffs for sinking the shaft at an agreed price per foot was unquestionably a joint contract. But aside from this contract the company employed Bruce and Horton to work by the day in excavating an engine room. They were to receive each four dollars for every day they worked. Separate accounts were kept with each, and payments were made to them individually.

According to the testimony of the secretary of the company, the amount still due Horton on his separate account for days' work was $200, and the amount due Bruce individually for days' work was $128. Although the action was joint, the court permitted this evidence to go to the jury, and afterward denied the defendant's motion to exclude it, to which ruling the defendant excepted. It was not admissible in any view of the case, for any purpose. Its only tendency was to mislead the jury. The motion to exclude it should have been allowed. The simultaneous hiring of two or more persons to work by the day, each at a stipulated price per day, and each to be paid for the number of days he works, constitutes a several contract with each. "Where one is bound by contract to two persons (as B and C) severally and only severally (their interest being also several), they not only may, but it seems *must*, sue upon it separately; for the case is in effect that of two distinct contracts, though contained in one instrument." Gould's Plead., chap. 4, § 60.

The court instructed the jury "that if the defendant hired the plaintiffs jointly to do the work in the chamber by the day, they will find for the plaintiffs for at least the amount that the defendant admitted to be due the plaintiffs."

This instruction is not warranted by the evidence. If as a proposition of law it is sound, it was nevertheless error to give it if there was no legal evidence upon which to base it.

As we have already seen, the only evidence to which this instruction could apply, the court erroneously refused to exclude on motion of defendant. The instruction was misleading. Says Judge Breese in *Ewing* v. *Runkle*, 20 Ill. 464: "The court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which alone instructions can be properly raised."

The evidence neither proves nor tends to prove a *joint* contract. The agreement was in its nature several. As to the facts testified to connected with their employment, there is no substantial variance, unless indeed the testimony of Bruce that the contract was joint is to be considered. But this was a mere legal conclusion of the witness which the facts did not authorize, and to which it was not competent for the witness to speak.

In these views Brother Elbert concurs.

The judgment is reversed and the cause remanded for further proceedings.

Reversed.

STEEL v. SOLID SILVER GOLD AND SILVER MINING COMPANY.

(13 Nevada, 486. Supreme Court, 1878.)

Authority of president of corporation to hire labor. Defendant moved for a nonsuit because there was no showing that defendant ever employed plaintiff, or that H., who did employ him, had any authority to act for defendant. *Held*, that the motion was properly denied because plaintiff had testified that he was employed by H., who claimed to act for defendant, and the answer which was verified by H. as defendant's president, admitted that plaintiff went into defendant's employ, and this at least constitutes *prima facie* evidence that H. was authorized to make the contract on behalf of his company.

Appeal from the District Court of Storey County, First Judicial District.

LEWIS & DEAL, for appellant.

A. B. ELLIOTT, for respondent.

By the Court, LEONARD, J.

This is an action to recover nine hundred and forty-nine dollars, alleged to be due plaintiff from defendant for labor performed by the former for the latter, as defendant's superintendent, between September 1, 1876, and March 15, 1877, at an agreed price of one hundred and fifty dollars in gold coin per month, and for money paid out by plaintiff for defendant; also, for goods sold and labor performed by other persons for defendant, at its special instance and request, the latter demands having been assigned to plaintiff. The jury found a verdict for plaintiff in the sum of eight hundred and seventy-two dollars. Defendant moved for a new trial on the grounds of insufficiency of evidence to justify the verdict and errors in law occurring at the trial. This appeal is taken from the order overruling the motion for a new trial, and from the judgment.

After plaintiff rested, defendant moved for a judgment of nonsuit, "because there was no showing that defendant ever employed plaintiff, or that one Hewson (who did employ him), was an officer of, or had any authority to act for, defendant." The court overruled the motion, and its action in this regard only is urged by counsel for defendant as error.

Under the pleadings in this case, it is not necessary to decide whether or not the president of a mining company can bind the latter by contracts of employment made, or for supplies used, in the usual business of such company, without authority to enter into the same from the board of trustees.

In the first count of the complaint plaintiff alleges that on or about September 1, 1876, he and defendant entered into an agreement, whereby plaintiff undertook and agreed to perform the duties of superintendent of defendant's mining claim in Storey county, and defendant agreed to pay plaintiff therefor one hundred and fifty dollars in United States gold coin per month; that plaintiff entered the employ of defendant under such contract on said day, and so continued until March 15, 1877; that by reason of the premises defendant became indebted to him on account of said labor in the sum of

nine hundred and seventy-five dollars, no part of which has been paid, etc.

In the answer defendant denies "that at the time in said complaint alleged, or at any time, the plaintiff and defendant made or entered into the alleged agreement in said complaint set forth"; denies "that defendant undertook, promised or agreed to pay plaintiff for the alleged services * * or for any services to be done or performed by plaintiff the sum of one hundred and fifty dollars per month, or any sum whatever"; denies "that plaintiff continued to work for defendant to and including the fifteenth day of March, 1877, or to any date later than the first day of November, 1876"; denies "that defendant became, is, or ever was, indebted to plaintiff in the sum of nine hundred and seventy-five dollars, or in any other sum, except as hereinafter set forth"; that is to say: "On or about November 1, 1876. defendant and plaintiff accounted together of and concerning all transactions and dealings theretofore had or existing between said parties, and thereupon found the sum of two hundred and thirty-nine dollars due plaintiff from defendant; that defendant at divers times from said November 1, 1876, to March 1, 1877, paid to plaintiff the sum of one hundred and seventy-one dollars; that defendant tendered to plaintiff on or about March 1, 1877, at Virginia city, the further sum of sixty-eight dollars in full payment and satisfaction of said indebtedness, and is still ready and willing to pay said sum to plaintiff, but that plaintiff refused at the time of such tender, and still refuses to receive the same; that since said first day of November said plaintiff has neither done nor performed any work, labor or services, nor paid out any money for said defendant."

It can not be doubted under the pleadings stated in substance above, that there was no necessity of showing by proof, that Hewson was authorized by the trustees of defendant to employ plaintiff. At the time the motion for nonsuit was made, plaintiff had testified that he was employed by Hewson alone, who claimed to be defendant's president, and letters had been introduced signed by Hewson as president and Applegate as secretary, dated at the office of the company in San Francisco, recognizing plaintiff as defendant's agent, and giving orders as to plaintiff's duties. Plaintiff had testified as to

the period of his employment and the character of his services; also that Hewson in September, 1876, represented to plaintiff that he (Hewson) had informed the trustees and stockholders of defendant that plaintiff was to receive four dollars per day; that he refused to continue work for such sum; that Hewson then agreed to pay him forty-four dollars for the eleven days' work in July, and one hundred and twenty-five dollars for the month of August, and thereafter one hundred and fifty dollars per month. The answer was verified by Hewson, who swore that he was defendant's president. By the answer, defendant admitted that plaintiff went into defendant's employ September 1, 1876, and so continued until November 1, 1876. Such admission, together with plaintiff's testimony that he was employed by Hewson as president of defendant, and by no one else, was *prima facie* evidence at least that Hewson was authorized to enter into a contract of employment. It was, then, for the jury to decide from the evidence what amount, if anything, defendant agreed to pay plaintiff, as well as the length of time he continued in such employment. In the second count of the complaint it is alleged, that between September 1 and October 1, 1876, Peasly & Mercer, at the special instance and request of defendant, performed labor in and about defendant's mine, which labor was reasonably worth the sum of forty-seven dollars; that defendant agreed to pay Peasly & Mercer said sum; that no part had been paid, and that on the seventeenth day of March, 1877, Peasly & Mercer sold, assigned and delivered said demand to plaintiff.

In the answer defendant denied that the work was of any greater value than nineteen dollars, and denied also that it promised to pay any sum therefor. There was no denial that defendant ordered the work done, and plaintiff testified that it was ordered by himself and Hewson. Defendant was therefore liable under its denial alone, for the reasonable value of the work as stated in the answer, without proof that Hewson, who ordered it done, had authority to make the order. And a recognition of Hewson's authority to bind defendant to the extent of the reasonable value of Peasly & Mercer's work, was certainly some proof of his authority in relation to his contract with the plaintiff. What we have said of the second count is also true of the third.

The court did not err in denying defendant's motion for a nonsuit; and the order and judgment appealed from are affirmed.

SCOTT ET AL. v. KITTANNING COAL CO.

(89 Pennsylvania State, 231. Supreme Court, 1879.)

[1] **Severable contract.** The K. Coal Co. agreed to deliver 50,000 tons of coal within a year at the rate of 6,000 tons monthly at the option of S., who was to give notice by the 25th of each month of the amount required for the succeeding month. *Held*, to be a severable contract.

Waiving time of, without waiving right to, demand. Where under contract the buyer was to call for coal on a certain date of each month and for certain quantities, and the first deliveries were made at irregular periods and in irregular quantities, but never except upon demand—such course of dealing did not release the buyer from his duty to make demand.

Rescission not allowed, when—Quality. Where, under contract for coal of a certain quality, coal of an inferior quality has upon some of the deliveries been received and disposed of before its inferior quality was discovered, the buyer is in no position to rescind, but must rely upon his right of set-off or upon a separate action for damages.

The stealthy substitution of an inferior article upon contract to deliver a better quality is a fraud; the tender of coal of either better or worse quality than that contracted for is no compliance with a demand under the contract.

The false statement by vendor of the cost to him of an article which he is about to sell is a case of moral but not of legal turpitude, and will not sustain an action for deceit.

Under the plea of non-assumpsit, the defendant is entitled to give any evidence which shows that plaintiff has no right to recover, and in this case the court erred in refusing testimony that plaintiff had fraudulently substituted inferior coal for that which it contracted to deliver.

Measure of damages. The simple rule that the measure of damages is the difference between the contract price and the market price at the time the contract ought to have been completed, would be inadequate in a case like this. In this case nothing short of the value of the contract would be a compensation, to be determined by deducting from the contract price the cost of delivery, including the royalty and the value of the coal as it remained in place.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

[1] *Morgan* v. *McKee*, 3 M. R. 128.

Case by the Kittanning Coal Co. against John C. Scott & Sons to recover damages for a breach of contract to take and pay for 50,000 tons of coal.

Defendants pleaded payment, and on the trial added the plea of *non assumpserunt.*

The terms of the contract and the numerous offers of evidence with the instructions given and refused are sufficiently stated in the opinion.

The plaintiff had judgment below.

SAMUEL DICKSON & JOHN C. BULLITT, for plaintiffs in error.

A. SYDNEY BIDDLE & R. C. MCMURTRIE, for defendants in error.

By the Court, TRUNKEY, J.

The Kittanning Coal Company agreed to deliver, on board vessels at Greenwich wharves, fifty thousand tons of its best run of mine bituminous coal, denominated Excelsior vein, from collieries in Clearfield county, commencing with March 1, 1874, and ending with February, 1875, at the rate of six thousand tons monthly, at the option of John C. Scott & Sons, they giving notice on or before the 25th day of each month of their requirements for the succeeding month. Scott & Sons agreed to furnish vessels for and receive the above stated quantity of coal, and make payment therefor at thirty days from date of each bill of lading. That the contract was not entire, but severable, is obvious: *Lucesco Oil Co.* v. *Brewer et al.* 16 P. F. Smith 351; *Morgan et al* v. *McKee*, 27 Id. 228.

The company delivered, and Scott & Sons received, under this contract, eighteen thousand thirty-eight and one half tons of coal. This must be taken as an uncontroverted fact. The defendants affirm it. The plaintiffs proved it in the first breath of their testimony; repeated it, and added that this suit was brought to recover the damages sustained by the company by the neglect of Scott & Sons to take (or rather call for, when the amount would have been readily supplied) the balance of the fifty thousand tons at the price named in the contract (see their history of the case); and in their declaration, aver that they "have done all things on their part required by the said agreement to be done, and were always ready and willing

to deliver coal pursuant to their said contract to said defendants; and although said defendants did accept and pay for a small quantity of said coal, to wit, ten thousand tons, yet they, the said defendants, did not, nor would not, during the term of the said agreement, receive the residue of said coal."

During the whole time for delivery and receiving of the coal, the defendants gave no notice, on or before the 25th of any month, of their requirements for the succeeding month. Deliveries were made from time to time, as called for, beginning in March and ending in October. This also both parties affirm.

It was the duty of the defendants to make the calls for the coal, not exceeding six thousand tons per month, and receive the same, so as to permit delivery of the fifty thousand tons within the time limited. Nothing in the offers of testimony, for the purpose of showing a waiver of the requirements as to notice, would warrant a jury in finding that the defendants were relieved from making calls so that the plaintiffs could deliver the coal within the terms of the contract. What matters it whether proof was received of a course of dealing, showing a waiver of notice on the 25th day of each month, when the fact was already patent and undeniable that no coal was delivered or received without notice, and that such notice never was given on that date, but on such dates as suited defendants' convenience? The rulings upon those offers were not erroneous.

When notice was given to the plaintiffs, if they were bound to deliver at all in pursuance thereof, they were bound to deliver the very coal designated by the contract. They could not lawfully substitute any other without defendants' consent, and defendants could have refused any other coal, whether inferior or superior, for they were entitled to the specified article. If the plaintiffs stealthily substituted inferior coal, they perpetrated a fraud upon defendants, for which they are answerable. If authority were wanting for the foregoing, it is in the cases cited by defendants, but it is not gainsaid.

It is contended by defendants that if fraudulent substitution of coal was made in the delivery, they may now rescind the contract. The cases cited, we think, do not rule this. Where a servant or laborer claims wages, a physician or attorney

fees, an agent or trustee commissions, fidelity lies at the bottom of the service, the breach whereof forfeits right of compensation. If two have an executory contract and one colludes with the other's agent respecting its performance; or if in an agreement for sale, the price to be fixed by C. one party bribes C. the wrongdoer shall not profit by his turpitude, nor by the agreement itself. In a sale and delivery of goods, there is not such relation of trust and confidence as where one does service for another, and in delivery of a similar but different article there may be no fraudulent intent, and if there be, it is not of so heinous a nature as bribing a referee or corrupting the other's agent. True, a fraudulent delivery of one article for another authorizes rescission of an entire contract; perhaps would of a severable one, but not after the goods had been accepted, paid for and consumed. Rescission is one form of remedy for a defrauded party which, generally, he may exercise upon discovery of the fraud, though he can not wholly restore; and if the fraud be not discovered in time for that remedy, others remain whereby he may recover damages. This contract was severable and the coal delivered was paid for and used by defendants. They can restore nothing. They never notified plaintiffs that they would receive no more coal for their default in performance. We are not convinced that there was error in holding that the appropriate remedy for the alleged fraud, discovered at the trial, was by set-off or action for damages.

The pleas were "payment" and "*non assumpserunt.*" During the trial defendants moved to amend by pleading set-off specially, which was denied. Had notice been given, under the plea of payment, the set-off could have been proved with like effect, as if specially pleaded, and, consequently, the motion was really for leave to then give notice of special matter. Whether to allow it was in the discretion of the Court of Common P.eas. The case was not brought within the Act of 1806, which permits a defendant to "alter his plea or defense, on or before the trial of the cause." The rights of defendants under that act are well stated by Lewis, J., in *Yost* v. *Eby*, 11 Harris, 327.

Error is assigned to the rejection of evidence of a false statement of the president of the company, as to the cost of placing

coal on board vessels at Greenwich, made in negotiations for the contract. An action for deceit for fraudulent misrepresentation by the vendor of the price he had paid, or of the price he had been offered for the subject of the contract can not be sustained: *Hemmer* v. *Cooper*, 8 Allen, 334; *Davis* v. *Meeker*, 5 Johns. 354. The defendants rely on *Krumbhaar* v. *Birch*, 4 W. N. C. 144, and *Short* v. *Stevenson*, 13 P. F. Smith, 95, as ruling the point in their favor. The former is where one sold his right, title and interest in a patent right, for territory including Philadelphia, representing that he owned half the patent right, whereas, he had before sold his whole interest for Philadelphia; and the latter where one purchased land for himself and associates and pretended to his associates that he had paid $12,000 for it when he had only paid $6,000. These decisions do not touch the question, is it a fraud for a vendor to misstate the cost or price of the article he is selling? The legal answer seems as well settled as the moral one, though they are dissimilar, and the seventh assignment is not well taken.

By the plea of *non assumpsit*, the defendant puts the plaintiff on proving his whole case, and entitles himself to give in evidence anything which shows, that at the time the action was commenced, the plaintiff had no right to recover: *Heck* v. *Shener*, 4 S. & R. 248. That action was for housekeeper's services and for goods sold, and it was held that, under the plea, evidence was admissible that the plaintiff had embezzled goods of defendant, not as a set-off, but to defeat the action. "As to the objection of the plaintiff being taken by surprise, it is no greater surprise, than when under the same plea, the defendant gives in evidence, a release, infancy, or coverture. Neither do I think there is much force in the other objection, that the matter of the evidence is not a liquidated debt or demand. If it is of sufficient magnitude to bar the plaintiff's action, there will be no need of going into calculations. But if not sufficient for that purpose, it is easy for the jury in this action to ascertain the amount to be deducted from the plaintiff's demand, as it is for the jury in an action to be brought by the defendant against the plaintiff to ascertain the amount of his damages." Per TILGHMAN, C. J. Under this plea the defendant may show that the plaintiff is

an insolvent debtor and the cause of action vested in his trustees; that the plaintiff accepted goods at another place than that mentioned in the contract; a former recovery; and that the work for which the plaintiff claims was done in an unworkmanlike manner: *Kennedy* v. *Ferris*, 5 S. & R. 394; *Scott* v. *Province*, 1 Pitts, 189; *Gilchrist* v. *Bale*, 8 Watts, 355; *Gaw* v. *Wolcott*, 10 Barr, 43. In *Falconer* v. *Smith*, 6 Harris, 130, it was held that, in an action on notes given for machinery, it was competent for the defendant to prove that when the agreement was made the plaintiff warranted the machinery to be of a certain quality and that the warranty had failed, though the notes were given several months after the date of the agreement. The plea of *non assumpsit* "entitles the defendant, without prior special notice, to give evidence of anything which shows, *ex æquo et bono*, the plaintiff ought not to recover. This is emphatically true of matters of defense springing from or immediately connected with the transaction sued on, and impeaching the consideration of the contract averred by the plaintiff * * * * It is true that under our more recent decisions, unliquidated damages for a breach of warranty may be averred as matter of set-off, and then a special plea or notice would be necessary; but, as was justly observed in *Sadler* v. *Slobaugh*, 3 S. & R. 388, a breach of warranty may, at the option of the defendant, be either reserved as the foundation of a separate action, or set up as a defense, going to the consideration of the *assumpsit* sued on." Per BELL, J.

In various forms the defendants offered to prove that the plaintiffs fraudulently substituted inferior coal from other mines, for that which they had contracted to deliver, and, concealing this fact, delivered the inferior article in part performance of the contract; that the defendants did not know at the time of such deliveries that the coal was of this inferior character; that finding objections made by their customers, they inquired of plaintiffs and were assured by them that the coal delivered was of the kind stipulated, and they accepted and paid for the same as part of the coal mentioned in the contract, believing it to be such; and that this fraudulent substitution involved the defendants in great loss, prevented them from making sales of the balance of the coal mentioned

in the contract, and disabled them from receiving the same.

At present it must be taken as if they had the testimony at hand to establish the facts in the offers. Had it been received it might have availed as a complete defense. The matter was immediately connected with the transaction which is the basis of this suit; it shows a willful injury in the performance of part of a contract by the plaintiffs upon which they claim damages because the defendants failed to perform. By the settled law of this State the offered testimony was admissible under defendants' plea of *non assumpserunt*—not to prove a set-off, but to prove that the plaintiffs had no right to recover. Besides, it was again specially offered as tending to prove that the plaintiffs were not ready and willing to deliver the coal stipulated in the contract. Why was it not admissible for this purpose? If the company pretend they were always ready and willing to perform, is it not evidence in rebuttal that when called on for coal they gave it from other mines? Slight it may be in the opinion of the court, but its weight was for the jury. We are of opinion there was error in rejecting the offers of testimony set forth in the second, third, fourth, fifteenth and nineteenth assignments.

The only remaining assignments we shall notice are the twenty-fifth, twenty-sixth and thirty-first, which relate to the question of damages. We think the instructions of the learned judge correct, except in not considering the value of the coal in plaintiff's mines; but it seems his attention was not directed to this, and we would pass it were the cause not to be tried again. Compensation should be the criterion in this as in other actions for breach of contract. Most frequently the simple rule that the measure of damages is the difference between the contract price and the market price at the time the contract ought to have been completed, gives the injured party a fair recompense for his loss. In a case like this that would be inadequate. Had the plaintiffs mined and stocked so large a quantity of coal the loss in increased handling, waste and the like, would not be covered by the difference between the market and contract price, to say nothing of the improbability of finding a market for the coal. The contract did not require them to mine and stock—it was enough if they were competent to deliver the coal according to con-

tract; that is, had their mines in order, the miners and all necessary means to mine and deliver the coal, and were prevented by default of defendants. In such case, nothing short of the value of the contract would be a compensation. That would be determined by deducting from the contract price the cost of delivery, including the royalty and the value of the coal as it remained in place. Possibly the coal in the opened mines, in working order, and with large capacity, at the time the contract should have been performed, was of no value to the vendors. It may have been worth nothing above the royalty. Unless it was worthless as it remained in place, the property of the plaintiffs, they ought not to recover the difference between the contract price and the sum of the cost of delivery and royalty.

Judgment reversed, and a *venire facias de novo* awarded.

RHYND v. HYNDMAN ET AL.

(54 Maryland, 527. Court of Appeals, 1880.)

Contract to deliver stock—Demand. Defendants contracted to deliver stock on or after a date named, upon demand. *Held*, that the contract being joint, and not a negotiable instrument, a demand upon one of the joint contracting parties was sufficient.

Statute of limitations on demand contracts. And that the statute of limitations did not begin to run until the demand was actually made.

Appeal from the Circuit Court for Allegany County.

The case is stated in the opinion of the court.

The cause was argued before BARTOL, C. J., GRASON, ROBINSON and IRVING, JJ., for the appellees, and submitted on brief for the appellant.

JOHN MCCLEAVE and A. HUNTER BOYD, for the appellant.

J. H. GORDON, for the appellees.

BARTOL, C. J., delivered the opinion of the court.

This suit was brought by the appellant against the appellees on the 19th day of June, 1879. The contract sued on

is alleged in the declaration to have been made with the appellant, by the appellees jointly, on the 29th day of March 1875, whereby the appellees agreed, for the consideration therein stated, to transfer to the appellant *on or after the 15th day of October*, 1875, shares of stock of the Empire Coal Company of Allegany county, sufficient to amount to $500, at the market price of said stock, when the transfer should be demanded.

The declaration in the *first* and *third counts* alleged a demand for the transfer of the stock, made upon Hyndman, one of the appellees, on the 11th day of July, 1878. The demurrer to these counts was sustained.

The *sixth* plea of the appellees alleges "that the said stock was demandable by the said plaintiff immediately after the fifteenth day of October, 1875, and it was the duty of the plaintiff to demand the same within a reasonable time after said fifteenth day of October, and more than three years expired after the end of such reasonable time for making said demand, and before the bringing of this suit."

To this plea the appellant demurred, the demurrer was overruled, and judgment being entered for the defendants, the plaintiff has appealed.

Two questions are presented for our decision:

1st. Is a demand made upon one of several joint contractors, not partners, for the performance of a contract to be performed on demand, sufficient to bind all the joint contractors, the joint contract not being a negotiable instrument?

2d. From which time does the statute of limitations begin to run against an action upon a contract not negotiable, to be performed on demand?

1st. Where joint contractors are partners, it is well settled that a demand on one is sufficient to bind all. Where no such partnership exists, but the parties are jointly bound, a distinction has been made between negotiable instruments and joint contracts not negotiable.

With respect to the former, many cases have been cited by the appellees showing that in order to bind the endorsers, a demand must be made upon each one of the joint drawers, and that a demand on one is not sufficient; and in the same

manner where there are joint endorsers, not partners, notice of dishonor must be given to each. On this subject the authorities nearly all concur; the case of *Harris* v. *Clark*, 10 Ohio, 5, where the contrary was held, may be considered exceptional.

The reasons for the rule are very well stated by SWIFT, C. J., and GODDARD, J., in *Shepard* v. *Hawley*, 1 Conn. 370. The reasons which govern the liability of parties upon negotiable paper have not been held applicable to joint contracts, which are not within the law merchant.

In Chitty's Pl. (16th. Am. Ed.) 340, *note*, it is said:

"Where a previous demand is necessary to maintain a suit against two joint promisors, it is sufficient to aver a demand on one." For this are cited *Griswold* v. *Plumb*, 13 Mass. 298, and *McFarland* v. *Crary*, 8 Cowen, 253.

In *McFarland* v. *Crary*, the joint contractors were partners; it is therefore inapplicable. But in *Griswold* v. *Plumb*, the point was directly decided. Here two persons became bailees of goods to be delivered on demand, and it was held that a demand on one was sufficient, their undertaking being joint. The law is stated in the same way in 1 Wait on Actions and Defenses, 395. In *Holbrook* v. *Holbrook*, 15 Maine, 9, it was held, "If two are jointly liable a demand made upon, or notice given to one, is equally binding on both."

In 3 Comyn Dig. L., page 120, it is laid down "that if several are bound by obligation, covenant, etc., to do an act upon notice to them, notice to one is sufficient." *Terry & Lowe* v. *Reding*, Moore's (K. B.) R. 555.

In *Whitcomb* v. *Whiting*, 2 Doug. 652, it was decided that part payment by one of several joint promisors on a note, was good to remove the bar of the statute against all the joint contractors.

That decision was followed by *Perham* v. *Raynal*, 2 Bing. 306, and *Burleigh* v. *Scott*, 8 B. & Cres. 36: and Mr. Greenleaf says, though sometimes questioned, seems now firmly established: 1 Greenleaf Ev. sec. 174, (note).

In *Ellicott* v. *Nichols*, 7 Gill. 104, the court say, in speaking of *Whitcomb* v. *Whiting*, "The promissors were subjected to a joint and common responsibility; under such circumstances,

it might well be maintained that a payment made by one of the parties to the note, was a payment made for the benefit of all." And on page 106, referring to the same case, the court say, "because at the time of the payment, the parties were jointly liable for the debt, and one might, therefore, be considered as the agent of the other with respect to the debt." This reasoning seems to us to apply to the point under consideration.

For many purposes the law treats joint contractors as one person. A release to one is a release to all; when jointly interested in the contract, one can not sue without the others; nor can one be sued without the others; and we think, both upon reason and authority, a demand on one was a demand on all. It follows that it was error to sustain the demurrer to the *first* and *third* counts of the declaration.

2d. To determine the second question we must refer to the language of the statute. This provides that "the action shall be commenced or sued within three years *from the time the cause of action accrues.*" 1 Code, Art. 57, sec. 1. The contract sued on in this case was to be performed "on or after the 15th day of October, 1875, when the same should be demanded." The cause of action, therefore, did not accrue until demand was made. According to the terms of the statute, limitations would begin to run from that time.

This has been repeatedly decided.

In *Holmes* v. *Harrison*, 2 Taunt. 323, in King's Bench, the note sued on was payable after sight; it was held that suit was not barred till six years after it had been presented for payment. A similar decision was made in *Topham* v. *Bradick*, 1 Taunt. 571 (in the common pleas).

These decisions were followed by *Thorpe* v. *Oombe*, 8 Dow. & Ry., 347, where the note dated in 1810, was payable two years after demand. It appeared that demand was made on the 18th day of June, 1823:

BAYLEY, J., said, "I am clearly of opinion that the statute of limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently the statute affords the defendant no protection. The other judges concurred."

The doctrine of *Holmes* v. *Harrison* has been often recognized in this country: *Stanton* v. *Est. of Stanton*, 37 Verm. 411; *Thrall* v. *Mead*, 40 Verm. 540; *Little* v. *Blunt*, 9 Pick. 490; *Wenman* v. *Mohawk Ins. Co.* 13 Wend. 267; *Wolfe* v. *Whiteman*, 4 Harr. (Del.) 246. Other cases might be cited.

In *Fell's Point Savings Institution* v. *Weedon*, 18 Md. 326, on a certificate of deposit payable on demand, it was said, "the statute began to run when demand was made."

In support of a different doctrine, the counsel for appellees have cited several cases in which it has been held, that where the contract is to be performed on demand, if the demand be unnecessarily delayed beyond the time limited by the statute, the action will be barred.

Thus in *Pittsburg & Connellsville R. R. Co.* v. *Byers*, 32 Pa. St. 22, which was a suit to recover upon a subscription to stock: the court said, although the statute of limitations does not begin to run against a subscription to the stock of a railroad company till after calls are made for instalments, yet when no call is made for more than six years from the date of the subscription, the law will presume an abandonment of the enterprise, and from analogy to the statute, bar the recovery. So, in *Morrison* v. *Mullin*, 34 Pa. St. 12, it was decided that, "where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay." That decision was followed and approved in *Palmer* v. *Palmer*, 36 Mich. 487.

The cases in Pennsylvania and Michigan were not strictly decisions at law on the construction of the statute; they were decided by courts exercising equitable jurisdiction, and consequently stand upon different grounds. Like *Codman* v. *Rogers*, 10 Pick. 112, and *Little* v. *Blunt*, 9 Pick. 490, cited by the appellees, where the equitable doctrine of *laches* was applied. In *Little* v. *Blunt*, the legal rule was recognized.

The court say: "But if the promise had been of a collateral thing, which would create no debt until demand, it might be otherwise. It is clear that where no action will lie without a previous demand, ... in all such cases no cause of action accrues until after demand made, and the statute of limitations will begin to run from the time of the demand,

and not from the time of the promise. This distinction is obvious, and will reconcile all the cases."

It follows from what we have said, that in our judgment the sixth plea was not good, and the demurrer thereto ought to have been sustained.

Judgment reversed, and new trial ordered.

COOK V. ANDREWS & HITCHCOCK.

(36 Ohio State, 174. Supreme Court, 1880.)

[1] **Contract to prospect for coal.** Plaintiff made a contract with defendants under which they were to test his land for coal within a time limited. In case of failure to commence mining within one year they were to pay an annual rent which might afterward be applied as royalties on coal actually mined. They also had the right to abandon at any time. They did not abandon but kept possession without doing any prospecting. In an action for the annual rent it was *Held*: That if there was no minable coal on the land plaintiff could not recover, but that the burden of proof was on the defendants to prove such fact, which they could not do without making the development called for by the contract.

Pleading—Essential averments. The non-averment of an essential fact will prevent recovery although no demurrer be interposed on this account.

Burden of proof. When by law or contract a duty is imposed upon a party the burden of relieving himself of that duty rests upon himself.

Error to the District Court of Mahoning County.

Judgment was entered for the plaintiff in the Common Pleas; this judgment was reversed in the District Court, and the case is now brought to the Supreme Court by the original plaintiff.

The action was brought to recover the annual sum of $150 per year, for a series of years, by reason of failure to commence mining coal under a contract, of which the following is a copy:

"COAL CONTRACT."

"Deacon Cook to Andrews & Hitchcock. This article of

[1] *Hanson* v. *Boothman*, 2 M. R. 217.

agreement, made and entered into this 12th day of January, A. D. 1864, by and between Deacon Cook, of Green Township, Mahoning county, Ohio, party of the first part, and Chauncey H. Andrews, and W. J. Hitchcock, of Youngstown, Mahoning county, Ohio. Witnesseth: That the said party of the first part agrees to sell and lease all the mineral stone coal that is or may underlie, the following described tract or lot of land, situated in the township of Green, Mahoning county, Ohio, and is bounded as follows: On the north by land of Andrew Cochel, east by land of F. M. Frederick, on the south by the highway, on the west by land of M. Pettit, and Pearson D. Cook, and containing in the whole about one hundred and sixty acres of land. It is agreed by the parties, that first party may have all of the coal he may want for his own domestic purposes, at the bank mined from his own land, free of charge, and the further sum of fifty tons per annum, by his paying the first cost of the same at the bank should he want it.

And the second party agrees to pay the United States revenue tax on said coal, and also grants the exclusive right to test, open mines, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal. No coal to be mined under the house or barn or an area of five acres thereabouts. Second party have the right to abandon said premises at any time, and remove all houses and fixtures, and it is agreed by the party of the second part, that they will, within one year after the railroad is in running order from Niles to Washingtonville, test said land, by drilling or otherwise, and, if in case there should be discovered a minable vein or basin of stone coal of sufficient quantity and quality to justify the opening and mining of said coal in the opinion of the said second party, then they agree to pay the following rate per ton for all coal mined on said premises, to wit: Pay fifteen cents for each ton of 2,240 pounds of merchantable coal, the payments to be made and continued in the following manner, to wit: Pay in hand one dollar in an internal revenue deed stamp; the signing and sealing of this contract is an acknowledged receipt thereof.

Should second party fail to commence mining within one

year after the construction of said railroad, then they agree to pay first party one hundred and fifty dollars per annum thereafter, but such payments when made, shall be treated as advanced payments on coal to be subsequently mined, and this lease shall terminate in twenty years after the construction of said railroad. It is also agreed that all coal mined on said premises is to be accurately weighed, and the weight to be kept in a book which shall at all reasonable times, be open for the inspection of the said first party. It is further agreed that the said party of the second part is to have the privilege of using the said railroad, under-ground entries, buildings and fixtures for the purpose of mining and removing coal from other lands, and after the said mines become exhausted or unminable, they may continue the use of said railroad underground entries, buildings and fixtures, by paying the party of the first part the sum of twenty-five dollars for each year they may use them for the purpose of transporting coal.

All moneys due under the contract to be paid or made in bankable funds of the State of Ohio, and the payment for coal so mined to be made quarterly. And we, the parties to the signing and sealing of this contract, bind ourselves, our heirs, our assigns and legal representatives, to strictly adhere to the several covenants and agreements of this lease, as witness our hands and seals the day and year above written.

"DEACON COOK.
"C. H. ANDREWS.
"W. J. HITCHCOCK."

The amended petition (filed in pursuance of an order consolidating several causes of action to recover for annual rent for successive years), after specially alleging the obligation incurred by the defendants, avers that said railroad was completed August 1, 1869; that defendants have entered into possession of said premises under this contract, retained and still hold, and refuse to surrender the same to plaintiff; also that they have failed and refused to test said land for coal by drilling or otherwise, and have failed to commence mining coal on said lands within the time named in said contract.

The answer puts in issue the time when the railroad was completed, denies that defendants failed to test for coal, or that they are liable, unless there was coal in this land. They aver

they did make a search for coal, and found none, and that there was in fact none on the land, suitable for mining. Wherefore it is claimed there is nothing due on said lease. They also set up a surrender of the lease by mutual agreement. The reply denies the search for coal, denies that coal did not exist on the land, and denies the surrender of the lease. Upon the issues thus made, the case was tried to a jury, resulting in a verdict and judgment for the plaintiff for part of the amount claimed, a motion for a new trial was made and overruled, a bill of exceptions was taken, but it was not made part of the record by journal entry.

The district court reversed the court of common pleas, and remanded the cause, and this court is asked to reverse the judgment of the district court.

A. W. JONES, of JONES & MURRAY, for plaintiff in error, relied on *Powell* v. *Burroughs*, 54 Pa. St. 329; Bainbridge on Mines, 212, and cases there cited.

THOMAS W. SANDERSON, for defendant in error.

JOHNSON, J.

The bill of exceptions, which embodies the evidence and charge of the court, with the refusal to charge as requested, and the exceptions thereto, is not properly a part of the record within the rule in *Hill* v. *Bassett*, 27 Ohio St. 597; and *Burk* v. *P. C. & St. L. R. R.*, 28 Ohio St. 643.

As in the case of *Smith* v. *Board of Education*, 27 Ohio St. 44. The bill of exceptions, not having been made part of the record, must be disregarded upon error to this court.

The only question that is presented by this record is, as to the sufficiency of the petition to support a cause of action. In the absence of a bill of exceptions, we must presume that all the allegations of the petition were supported by proof of the facts alleged. If those facts do not warrant a recovery, the judgment must be reversed. There is no averment in the petition that there was a minable vein of coal on this land. If this averment is necessary to a statement of a cause of action under this contract, then the defect is not cured by verdict: *C. & P. R. R. Co.* v. *Stackhouse*, 10 Ohio

St. 567. Was the plaintiff required to aver and prove that minable coal existed on this land? If so, the judgment must be reversed. It is true there was no demurrer to this petition, for want of such an averment, but if it is an essential averment, there can be no recovery without it, as no cause of action was stated. It does not belong to that class of cases where there is a defective statement of the facts constituting a cause of action, which may be cured by verdict, but to that class where there is a failure to state a fact essential to a cause of action. If there was no minable coal on this land, there could be no recovery for the annual rent, and of course none for coal mined. The contract, in that event, would be of no value to either party.

It is manifest from a cursory reading of this instrument, that whether coal existed on this land, was unknown to the parties. If it did, in fact, exist, its discovery would enhance the value of plaintiff's land. The expense of making the necessary tests would, doubtless, be considerable. It was an inducement to a sale of the coal on the terms specified, that this test should be made at the expense of the lessees.

Hence the lessor granted to the lessees the exclusive right to make this test, as well as to mine the coal, if discovered, and bound them to make it within a given time free of cost to him.

He reserved no right to make the test, even if willing to incur the expense. Unless the lease was abandoned, or in some other way terminated, the exclusive right to the possession of the premises, for the purpose of searching for coal as well as for mining purposes, was vested in the lessees, and it was within their power to prevent any such test by the lessor, as would be necessary for him to make in order to enable him to aver and prove the existence of minable coal, if this burden is upon him.

In short, the lessees could retain this valuable privilege for twenty years, and obstruct the lessor from making the search for coal, without any payment, unless, at the termination of the lessees' exclusive right to make the test, the lessor should at his own expense, make the necessary search, to enable him to aver and prove the existence of minable coal.

It is said the failure to make the test within the time, subjected the lessees to an action for damages for breach of this

stipulation. Admit this, but if the burden of proving that there is minable coal on the land is essential to a recovery in the case at bar, it is equally so in such an action, and hence the plaintiff would be required to do that which the lessees have reserved (the exclusive right to do; *i. e.*, test the land. Such a construction of this lease would be grossly inequitable, and would practically defeat any action, except to recover for coal actually mined, or for rent per annum where the lessee had made the test and found coal, but failed thereafter to mine the same.

Again, it is expressly provided that should the lessees fail to commence mining within one year from the construction of the railroad, then they agree to pay $150 per annum thereafter, but such payment when made, shall be treated as advance payments on coal to be subsequently mined. This clause, in connection with the one granting the exclusive right to test for coal and to mine the same if found, casts upon the lessees the burden, where no test has been made, of showing, in order to escape payment of this annual sum, that there was, in fact, no coal on the land.

The lessees reserved the right to abandon the premises at any time. From the judgment in lessors' favor upon the issues, it appears they did not surrender or abandon, but retained possession. They did nothing to develop the coal, if any was there. As they had the exclusive right to make the test, no one else could. They alone possessed the power to ascertain, by a satisfactory method, this important fact. It seems to us, therefore, that while the exclusive right to test this land is retained by the lessees, the burden is upon them, in order to defeat a recovery, to aver and prove the non-existence of coal in minable quantity and quality. Much stress is laid upon the clause which provides that these annual payments "shall be treated as advance payments on coal to be subsequently mined," and it is insisted that they are to be treated as advance payments on coal, and hence, if there is no coal, there can be no recovery.

We have already stated, that, if in fact there was no minable coal, there could be no recovery, and this is all that this agreement proves.

The fact that if coal is thereafter mined, these annual pay-

ments shall be treated as advances upon coal thereafter mined, does not settle the question of pleading now before us, as to whose duty it is to aver and prove the existence or non-existence of coal.

Again, suppose the fact was established by these tests made by the lessees, that coal did exist in minable quantities, but the lessees refused to mine the same, the annual rent would nevertheless be payable, and could not be recovered back as advance payments on coal not mined. In such a case, it would be at the option of the lessees to lose these payments, made by not mining thereafter, or by mining to have credit on the coal thereafter mined. This contract is anomalous, and evinces great skill in guarding the interests of the lessees, but we think there is a clear duty imposed on them, when called on for payment of the annual rent stipulated to be paid on failure to mine coal; to show, either by one actual test, or by other competent evidence, that in fact there was no coal on the premises, in order to defeat a recovery. This conclusion is in accordance with the familiar principle, that when, by law or contract, a duty is imposed upon a party, the burden of relieving himself of that duty rests upon him.

Judgment of the District Court reversed, and that of Common Pleas affirmed.

BOYNTON, J., dissented from the judgment.

BROWN v. MORRIS.

(83 North Carolina, 251. Supreme Court, 1880.)

Brick contract—Title in owner of clay—Dealing with the maker. One Ultzman made brick on the land of plaintiff under contract by which no title to the brick was to pass until plaintiff was paid for his clay and his wood used in the manufacture.

Ultzman sold a lot of these brick to defendant, who supposed he was buying Ultzman's property, and in payment he applied a set-off which he had against Ultzman.

Held, 1. That the contract was not within the statute of frauds.

2. That the apprehension of the defendant that he was buying from Ultzman, not having been induced by Ultzman, did not prevent recovery in the name of the real owner.

Variance in number. Where the complaint avers delivery of 41,000 brick, and the proof shows delivery and acceptance of 41,228 brick, it is an immaterial variance and the verdict will stand for compensation for the full number.

Civil action tried at spring term, 1880, of Cabarrus Superior Court, before McKOY, J.

Judgment for plaintiff. Appeal by defendant.

W. H. BAILEY, for plaintiff.

W. J. MONTGOMERY and WILSON & SON, for defendant.

SMITH, C. J.

The plaintiff alleges a sale and delivery by himself to the defendant of 41,000 bricks of the value of three hundred and sixty-eight dollars and sixty-six cents (as set out in a bill of particulars annexed), and brings his action to recover the amount due. The defendant denies the allegations and says that he purchased about 26,500 bricks from one Ultzman who was indebted to him, and had given credit therefor. The court submitted two issues to the jury, which, with the findings, are as follows:

1. Did the plaintiff under a verbal contract sell and deliver to the defendant any bricks? Response: Yes.

2. What is the value of said bricks and interest on the same? Response: Three hundred and nine dollars and twenty-one cents with interest from March 10, 1877, up to date. The defendant asked the court to submit an issue, as the only one arising upon the pleadings, in place of the others. Did the plaintiff sell and deliver to the defendant 41,200 bricks of the value of three hundred and eight dollars and forty-six cents? which was refused. The defendant also asked certain instructions to be given to the jury:

1. Plaintiff is not entitled to recover, because, according to his contract as testified to by Ultzman, the property in the bricks was in Ultzman, and the plaintiff had no lien by virtue of his parol contract with Ultzman that the bricks were to be his until he was paid for his dirt and wood used in their manufacture. The court decided and charged the jury that unless the property of the bricks was in the plaintiff he could not

recover; that the bricks being made on the plaintiff's land by Ultzman, they could enter into a valid parol contract that the property therein should be in the plaintiff.

2. That if the defendant bought of Ultzman without notice of the arrangement between him and the plaintiff, the plaintiff can not recover. The court declined, and instead charged in substance that they must act upon the whole testimony, and not upon that of the defendant alone, and if the bricks were the property of the plaintiff and were under a verbal contract sold and delivered to the defendant, he would be responsible therefor.

3. That this being a special contract set out in the complaint there could be no recovery upon the common count for goods sold and delivered. This was also refused and the jury were directed to inquire whether there was any and what contract entered into by the parties, and that if there was, the plaintiff must show a compliance with its terms on his part, and the plaintiff could only recover on the express and not on the implied contract. These rulings we proceed to consider. The allegations of the complaint being denied, it was required of the plaintiff to prove his property in the goods, their sale and delivery to the defendant, and their price or value.

These propositions were embodied and passed on in the issues submitted, and none other were necessary or proper. Nor was there any error in the refusal of instructions requested; first the land on and f om which the bricks were manufactured belonged to the plaintiff and it was perfectly competent for him to agree with Ultzman that the property should remain unchanged and follow the material into the manufactured article. The statute of frauds has no application to a contract concerning personalty which the brick became, and which but leaves title where it was, in the owner of the soil. Secondly, although the defendant may have supposed the property was in Ultzman, his debtor, and that payment could be made by giving a credit on the indebtedness due from him, this erroneous belief can not have the effect of defeating the claim of the true owner, for goods sold by one who was in fact his agent only in the transaction. Contracts are binding in the sense understood by both parties, not by one only, and according to a fair interpretation of their nature and terms.

There was evidence of conversations between the defendant and the plaintiff in regard to the sale of the bricks and of the terms agreed on with Ultzman, but there was none of any representations on the part of the latter of his ownership of the bricks nor of any enquiry by the defendant in reference thereto. The bricks were sold for the plaintiff and he ratifies the act. Had there been a positive and distinct understanding that the contract of sale was by Ultzman personally, no one else could enforce it, and the plaintiff would be compelled to seek his remedy for the taking and conversion in some other form. But the proposition that because the defendant thought, without being misled by any one, that the goods belonged to the agent, the principal and owner could not recover, is without support in reason or authority. If the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal is known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal will also be liable to be sued and entitled to sue thereon, in all cases unless from attendant circumstances it is clearly manifested that an exclusive credit is given to the agent and it is intended by both parties that no resort shall in any event be had by or against the principal upon it: Story Agen. § 160, a. "It is a well established rule of law that a sale by a factor creates a contract between the owner and the purchaser": *Golden* v. *Levy*, 1 Car. L. R. 527.

In *Tull* v. *Trustees*, 75 N. C. 424, a case very similar to this, the facts were these: The contract for the purchase of the bricks sued for was made with one Miller, one of the trustees of the church, whose building was then in process of construction, upon his representation that he had authority to make the purchase, and the bricks were delivered to the trustees. In fact Miller had no such authority from the trustees, and the trustees proposed to show further that they refused to buy the bricks and that Miller proposed to buy and give them to the church.

The court say: If Miller was authorized to make the contract which he did make with the plaintiff to deliver the articles to the church, at the charge of the church, then the church is liable upon the special contract. If Miller was not authorized

to make the contract, and therefore the articles were delivered, received and used without any special contract, then the defendants are liable on the implied contract. Here the defendants labored under a similar misapprehension with Morris, and yet they were held liable for the goods, for the simple reason that they were delivered by the owner and used by the church. There is no material difference in this particular between the two cases.

Thirdly, the complaint describes the contract to be for the delivery of 41,000 bricks of the value of three hundred and eight dollars and forty-six cents, and refers to the bill of particulars annexed.

This exhibit shows a succession of deliveries and at different prices, aggregating the number and price set out in the complaint.

The instruction prayed assumes that this precise number of bricks must be proved to have been delivered and for the exact sum mentioned, in order to any recovery upon the complaint as framed. If this particularity was necessary, the new system would be no improvement upon the old, and the very mischief it was intended to obviate would remain.

But neither under the one nor the other can the position be maintained, and the fallacy lies in treating this as an action to recover upon a special unperformed contract, for the non-payment of a part of the articles delivered, without the delivery or any legal excuse for the non-delivery of the others, as decided in *Johnson* v. *Dunn*, 6 Jones, 122; *Russell* v. *Stewart*, 64 N. C. 487, and other cases of the same class. Here, the proof was of the delivery of 41,228, an excess of 228 over the number mentioned in the complaint, so that taking the complaint in its strictest sense, there was a full compliance with the alleged contract on the plaintiff's part, and upon a well settled rule he could recover in general *assumpsit*.

When there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment is passed, general *assumpsit* may be maintained and the measure of damages will be the rate of recompense fixed by the special contract: Am. notes to *Cutter* v. *Powell*, 2 Smith's Lead. Cases, and the numerous references there given.

The code of civil procedure provides a more liberal system,

and if the strict rules of pleading and practice, before in use, denied a remedy, it is now full and ample.

"No variance between allegation and proof, unless the adverse party has been misled, is material; and if he has been misled an amendment may be made to remove the variance": § 128.

When the variance is not material the judge may direct the fact to be found according to the evidence, and order an amendment: § 129; *Shelton* v. *Davis*, 69 N. C. 324.

It is a singular contention that under a contract to deliver a definite number or quantity of goods, and a delivery in excess, the vendor is not only debarred a recovery of the excess, but of such as pursued and fulfilled the contract.

But if under the contract described in the complaint and explained by reference to the accompanying exhibit, there had been delivered a smaller number of bricks, and they had been received and used by the defendant without objection, we see no reason why the plaintiff would not be entitled to compensation for such as were delivered; and we are not disposed to carry the doctrine that a partial delivery under an agreement to deliver a definite quantity or number of goods, leaves the purchaser the possession and use of such as are delivered, without liability to the seller beyond the decided cases, and as operating only when the failure to deliver is willful and without legal excuse.

We had occasion at the last term in *Gorman* v. *Bellamy*, 82 N. C. 496, to advert to the disposition of the courts to relax this rigorous principle of the common law, and to substitute the more reasonable rule, suggested by the Supreme Court of the United States in *Dermott* v. *Jones*, 23 Howard, 220, upon a presumed abandonment of the special contract, "that in such case the law implies a promise to pay such remuneration as the benefit conferred is reasonably worth": *Munro* v. *Butt*, 8 Ellis & Black, 738.

But our case is not within the rule applicable to special contracts willfully left unperformed, and clearly admits of compensation for such bricks as were delivered to the defendant, and so the case was properly left to the jury.

There is no error and the judgment is affirmed.

No error.

Affirmed.

ADAMS ET AL. v. ORE KNOB COPPER CO. ET AL.

(7 Federal Rep. 634. U. S. Circuit Court, W. D. N. C., 1880.)

Conveyance of freehold estate. In North Carolina freehold interests in lands may be conveyed by a simple deed of grant, and it is not necessary to use livery of seizin or deeds with sufficient consideration to operate under the statute of uses.

Condition subsequent—Failure to perform forfeits estate. Where lands were conveyed to parties upon the following conditions, to wit: that they at their own convenience and time, and at their own proper expense, make a fair test for minerals and metals on the aforesaid lands, and if any be found worth working to work the same and pay to the grantors one-fourth of the net profits, and this was the only consideration for the grant. *Held*, that this constituted a condition subsequent which the grantees should perform within a reasonable time, that it required a continuous performance, and if discontinued an unreasonable time it would work a forfeiture of the estate.

Breach of condition—Re-entry. In such a case, when the grantors remained in possession of the premises, upon the breach of the condition they became revested with the estate conveyed, unless they waived the forfeiture, and there was no need of a clause reserving the right of re-entry for the breach.

Waiver of breach. Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach.

This civil action was originally commenced in the State Superior Court for Ashe county, to recover the possession of the minerals and metals in a certain tract of land described in the complaint. The pleadings and proceedings are in conformity to the State Code of Civil Procedure. Under this code the distinctions between actions at law and suits in equity are abolished, and the civil action is adopted as the form of action for the enforcement or protection of private rights and the redress of private wrongs; and in such action all the rights of the parties, either plaintiff or defendant, in law or in equity, can be ascertained and adjusted in one suit. The relief demanded by the plaintiffs in their complaint is to be put in possession of the premises described, so that they may dig for and obtain the minerals and metals to which they allege they are entitled under the grant set forth in the pleadings; and also to have an account taken of the large rents and profits received by the defendant corporation in working

the mines for a number of years. The plaintiffs are the heirs at law of the grantees, and the grant under which they claim is as follows:

STATE OF NORTH CAROLINA, }
Ashe county. }

Know all men by these presents: That we, John L. Miller and George E. Miller, of the county of Ashe and State of North Carolina, do this day grant and convey unto James Calloway of Wilkesboro, North Carolina, his heirs and assigns; to B. C. Calloway, of Ashe county, North Carolina, his heirs and assigns; to Thomas S. Calloway of Ashe county, North Carolina, his heirs and assigns; and to Calloway, Cummings & Co., of the county of Knox and State of Tennessee, their heirs and assigns, forever, all the mineral and metallic interest on the following described lands, lying and being in the county of Ashe and State of North Carolina, on the waters of Peak creek and Roans creek, the waters of the South Fork of New river, contained in three several tracts, all adjoining, to wit: * * * on the following terms and conditions, to wit: that the said James Calloway, B. C. Calloway, Thomas S. Calloway, and Calloway, Cummings & Co., shall, at their own convenience and time, and at their own proper expense, make a fair test for minerals and metals on the aforesaid lands, and if, after said test has been made, any valuable minerals or metals shall be found worth working on said premises, to work it or cause the same to be done, and to pay over to the aforesaid John L. Miller, his heirs and assigns, and to the said George E. Miller, his heirs and assigns, jointly, the one fourth part of the net profits of the said minerals and metals.

The said James Calloway, his heirs and assigns; B. C. Calloway, his heirs and assigns; and Thomas S. Calloway, his heirs and assigns,—shall have each one seventeenth part of the net remaining three fourths of minerals and metals on the aforesaid lands. The remaining fourteen seventeenths of the said three fourths of net profits are to go to the said Calloway, Cummings & Co., their heirs and assigns. Said Calloway, Cummings & Co. are to pay the expense of testing the aforesaid property. And, further, said John L. Miller and George E. Miller, their heirs and assigns, grant unto the said James

Calloway, B. C. Calloway, Thomas S. Calloway, their heirs and assigns, Calloway, Cummings & Co., their heirs and assigns, forever, all the necessary mining privileges on the aforesaid lands, right of way, wood, and water, together with the right of occupancy of the necessary portions of said lands as may be necessary for the erection of buildings and residences for the accommodation of all such persons as may be engaged in operating and carrying on said mines and their necessary business, together with all the necessary appurtenances, without let or hinderance, thereto belonging or in anywise appertaining; provided, the said James Calloway, B. C. Calloway, Thomas S. Calloway, Calloway, Cummings & Co., their heirs and assigns, interfere as little as may be with the farming privileges of the said lands.

In testimony whereof we have hereunto set our hands and seals this ninth day of November, A. D. 1854.

(Signed.) JNO. L. MILLER. [SEAL.]
(Signed.) GEORGE E. MILLER. [SEAL.]

Signed, sealed, and delivered in presence of
WILLIAM HARRIS,
WILLIAM MILLER.

The execution of this grant is admitted by the defendants in the pleadings, but they insist that it was procured by the fraudulent misrepresentations of the grantees, and also, that at the time of the execution it was falsely read to the grantors, John T. Miller and George E. Miller, two of the present defendants. The defendants further insist that the said grant only conveyed an incorporeal hereditament—the privilege of digging for minerals and metals—and they are not entitled to the specific relief demanded in the complaint. The defendants further insist that the grant contains a condition subsequent which has not been performed, and the estate conveyed became void by reason of the failure to perform said condition; and as the grantors were in full possession of the premises at the time of said breach, the estate at once became revested in them, and they had full power to convey to the defendant corporation in 1873.

Several other defenses were set forth in the pleadings which need not be stated, as they were not considered in the trial of the case.

After the pleadings were filed in the State court the case was removed into this court upon the petition of "The Ore Knob Copper Company," a non-resident defendant acting under a charter obtained from the State of Maryland.

It was conceded by the counsel on both sides that the strictly equitable rights of the parties could not be considered and disposed of in an action at law in a federal court, where the systems of law and equity are separate and distinct as to jurisdiction and as to the forms and modes of procedure in administering justice.

The court informed the counsel that arguments would be heard as to the legal rights of the plaintiffs under this grant, and then proper issues would be found and submitted to a jury to ascertain the material facts on this part of the case. The other issues of fact presented in the pleadings would be reserved for future consideration if they become necessary.

CLEMENT, FURCHES & LINNEY, for plaintiffs.

FOLK, CILLEY, MCCORKLE, ARMFIELD & SMITH, for defendants.

DICK, D. J.

(In response to the arguments of counsel.)

I have listened with pleasure and have been much interested in, and benefited by the able and elaborate arguments of the counsel in this case. They have discussed legal questions which are not of frequent occurrence in the courts, and I am pleased to find that they are so familiar with the old learning of the common law.

In determining the questions which I regard as material at this stage of the case, it is not necessary for me to consider and decide many of the intervening points presented in the arguments. These points may become material if the jury should determine the issues of facts to be submitted in favor of the plaintiffs. I am of opinion that part of the plaintiffs, under the grants set forth in the pleadings, acquired a fee simple interest in the minerals and metals in the lands described, and also the privilege of using said lands, as far as necessary, for the purposes specified in the grant. In En-

gland, since the Act 8 and 9 Vict. and in this State since the Act of 1715, freehold interests in lands may be conveyed by a simple deed of grant, and it is not necessary to use livery of seizin, or deeds with sufficient consideration to operate under the statute of uses. In this State such grant, duly executed and registered, will be valid, and pass a freehold estate in lands, even without a consideration, if it does not come in conflict with the rights of creditors and subsequent purchasers.

The continuance of the estate conveyed to the grantees, in the grant before us, was dependent upon the performance of the condition subsequent expressed in the grant. By the terms of the condition it was to be performed by the grantees "at their own convenience and time." As the grantors derived no immediate benefit in consideration of the grant, and were to receive profits only upon the performance of the condition, it was the duty of the grantees to perform the condition subsequent in a reasonable time. What a reasonable time is the law does not accurately define, but leaves that question to be decided by the judge according to the facts and circumstances of a case, as admitted by the pleadings or as ascertained by the finding of a jury. As the evident intention and motives of the grantors, in executing the grant without any present consideration, were that they might receive continuous profits from the working of the minerals and metals in the lands, the obligation of the grantees was continuous; and if they failed to open the mines or discontinued to work them when opened, and did not resume operations in a reasonable time, their estate, under the grant, would be forfeited by this breach or non-performance of the condition subsequent contained in the grant.

The doctrines of estates upon condition seem to have been originally derived from the feudal law. A tenant was under obligation to render continuous service, and if he neglected to perform his service the lord could, by a writ of *cessavit*, obtain possession of the fief, as such continuous service was the consideration for the grant of the estate.

It was insisted on the part of the plaintiffs that at the common law the breach of a condition subsequent did not absolutely determine the estate; that a freehold could only be

defeated by an entry or claim made on the part of the grantor or his heirs, and until that was done the estate lost none of its original qualities and incidents, and that this right of entry or claim could not be assigned to a stranger to the conveyance. It was also insisted in the argument that in a conveyance like the one now before the court, there should be a clause providing for a *cesser* of the estate, and reserving a right of re-entry for a breach of the condition in order to enable the grantor to avail himself of a forfeiture for a breach.

It is a well-settled rule of the common law that the breach or non-performance of a condition annexed in the grant of a freehold estate does not cause an immediate *cesser* of the estate without a re-entry or claim by the grantor or his heirs, for the purpose of enforcing a forfeiture, although the grant may contain express words declaring it *ipso facto* void. As a freehold, at the common law, could only be created by the notoriety of livery of seizin, there was needed a corresponding notoriety in order to determine it. This rule was not applicable to estates for years, as they commenced without livery of seizin, and could determine without re-entry. As under the statutes of uses, devises, and grants, the ceremony of livery of seizin is dispensed with in the creation of freehold estates, it would seem that the ceremony of re-entry for the breach or non-performance of a condition ought to be dispensed with; but the old rule of the common law is still preserved, upon the principle that an estate commenced by a solemn act, viz: a grant, must be defeated by an act equally solemn, upon the maxim of the common law, *eo ligamine quo ligatur.*

At the common law there is a distinction between a condition that defeats an estate, but requires a re-entry, and a limitation or condition in law that determines the estate without entry. Words of limitation circumscribe the continuance of the estate and mark the period which determines it. Under certain conveyances, owing their existence to the statute to which we have above referred, in which livery of seizin is dispensed with in the creation of freehold estates, a condition may be annexed to such estate, and upon a breach of the same, the estate will immediately cease as to the first taker and pass over to a third person, to whom limited, and take effect

in possession without entry. It is not necessary for me to consider these doctrines of limitations and conditional limitations as the terms of the grant before us are in words of express condition, which render the estate liable to be defeated before its determination, and return to the grantors and their heirs, and not pass over to a third party. In such a case the rules of the common law require a grantor, or his heirs, on the breach of a condition, to make entry or claim before they can sustain an action of ejectment to recover possession of the forfeited estate; for when the grantor conveyed his estate he parted with the seizin, which he or his heirs can only regain by an actual re-entry or claim made for the purpose of enforcing a forfeiture. Upon re-entry or claim the grantor or his heirs became seized of the estate had at the time of making the grant upon condition, freed from any subsequent lien, incumbrance, or limitation. If the grantor or his heirs were in possession of the premises when the breach of the condition occurred, the estate revested in them at once, without any formal act on their part, and they were presumed after the breach to hold for the purpose of enforcing a forfeiture, unless they waived the breach by some acts showing an intention to continue the estate of the grantee. Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach.

In our case the grantors remained in possession of the premises from the date of the execution of the grant, and in 1873 alienated the same to the defendant corporation; and it is a question of fact to be determined by a jury, whether they did any act amounting to a waiver of any breach of condition on the part of the first grantors.

In the books upon the subject of estates upon condition, there are many nice constructions of the courts as to what words make a condition with a clause of re-entry, or without such clause expressed in the deed. This learning has been elaborately presented in the argument, but it is unnecessary for me to consider the question to much extent, as it is well settled that where there are express words in a deed, which of themselves make a condition (as in this case, "on the following terms and conditions"), there is no need of a clause reserv-

ing the right of re-entry for a breach thereof, in order to enable a grantor to avail himself of a forfeiture.

In this case, as it is stated in the pleadings and conceded in the argument that the defendant grantors remained in possession of the premises in controversy, I am of the opinion that they became revested with the estate conveyed if there was a breach of the condition expressed in the grant, unless they did some act which waived the forfeiture occasioned by such breach. Proper issues may be framed to enable the jury to ascertain from the evidence and find by their verdict whether there was a breach of the conditions expressed in the grant, and whether there was a waiver of such breach on the part of the grantors. The court will instruct the jury upon the question of reasonable time in the performance of the conditions.

The jury being impaneled it was conceded by both parties that the grantees did some work on the premises, in making explorations for minerals and metals, in the year 1854, and had done no work since that time.

The jury, after the charge of the court, returned a verdict for the defendants.

JONES v. KENT, Admr.

(80 New York, 585. Court of Appeals, 1880.)

Sale of stock, subject to division of profits on re-sale. Plaintiffs sold to defendant's intestate certain mining stock for a sum paid and "one half of whatever price the same should be sold for, when sold, over and above that sum." In an action to establish the transaction as a trust it was *held*, that the agreement imported an obligation to sell; that the time of sale was optional with the vendee going on his own judgment and discretion; but that after the death of the vendee, the plaintiff could compel a sale and a division according to the contract.

Substitution of bonds for stock—Dividends. A portion of the stock had been exchanged for bonds by consent of plaintiff, the vendee advancing a bonus to perfect the exchange. *Held*, that the bonds took the place of the stock, and were followed by the contract, the bonus of course being deducted upon an accounting; and that the plaintiff had no interest in dividends received by the vendee or the defendant upon the stock.

Appeal from judgment of the General Term of Superior Court of the City of New York, affirming judgment in favor of defendant entered after trial, at special term: 13 J. & S. 66.

This action was brought to have it adjudged that certain stock and bonds, which came into the hands of defendant Kent, as administrator of the estate of E. Rockwell, deceased, with the interest and dividends received thereon, were held by said defendant in trust; to compel a sale of said stock and bonds, and for an accounting, etc.

The facts appear sufficiently in the opinion.

DWIGHT JONES and WILLIAM STANLEY, for appellant.

A sale was clearly within the contemplation of the parties, and being contemplated the law implies a promise to perform: *Booth* v. *Cleveland Mill Co.*, 74 N. Y. 21; *Lorillard* v. *Silver*, 3 Transcripts of Appeals, 143, 145; *Wight* v. *Wood*, 57 Barb. 471. Plaintiff can not, therefore, be deprived of the benefits to be derived from such a sale: *Moore* v. *Executors of Moore*, Coxe (N. J.) 363. Whether or not a sale of the stock has taken place, plaintiff has a definite trust interest in it: *Ripley* v. *Larmouth*, 56 Barb. 21; *Foote* v. *Foote*, 58 Id. 258; *Foote* v. *Bryant*, 47 N. Y. 547; Willard's Eq. 603; Perry on Trusts, §§ 125-168; Lewin on Trusts, 115, 157; *Currie* v. *White*, 45 N. Y. 822. The sole fact that Rockwell is not living, is sufficient reason for plaintiffs being allowed to close out his interest: Willard's Eq. (Potter's ed.) 612. A court of equity may decree a sale of trust property at any time: Perry on Trusts, 396; *Wight* v. *Wood*, 57 Barb. 471, 475; Parsons on Contracts, vol. 2, p. 535; *Wiswall* v. *McGowan*, 2 Barb. 270; *Farmer's Loan and Trust Co.* v. *Hunt*, 16 Id. 514; *White* v. *Talmadge*, 35 N. Y. 223; *Howe* v. *Woodruff*, 21 Wend. 640. The condition precedent, if such existed, has been waived: Benjamin on Sales, 452, 453; *Wight* v. *Wood*, 57 Barb. 471; *Moore* v. *Executors of Moore*, Coxe (N. J.) 363. A condition precedent depending for its performance on the party who sets up non-performance, is no defense: Benjamin on Sales, 2d ed. 453.

GEORGE S. HAMLIN, for respondents.

The written contract neither expresses nor implies a trust, nor does it impose an obligation to sell the stock: *Lorillard* v. *Silver*, 36 N. Y. 579; *Wemple* v. *Stuart*, 22 Barb. 154, 160; *Moffatt* v. *Laurie*, 15 Com. Bench Rep. 582, 593. The contract clearly discloses an absolute sale: *Lent* v. *Hodgman*, 15 Barb. 274. The only right acquired by the plaintiff under the contract was a right to share in the proceeds of the stock over $3,000, contingent upon a sale for more than that sum. Such a sale was a condition precedent to any right or interest on the part of the plaintiff: *Lorillard* v. *Silver*, 36 N. Y. 578; *Wright, assignee*, v. *Wood*, 57 Barb. 471, 474; *Childs* v. *Smith*, 46 N. Y. 34; *Moffatt* v. *Laurie*, 15 Com. Bench Rep. 582. Even if a trust could be established, it would not avail the plaintiff: 3 Transcripts of Appeals, 145, 147.

DANFORTH, J.

Two instruments similar in form lie at the bottom of this controversy. They are in these words:

"Received of J. W. Jones, by agreement, one thousand shares of St. Joe Lead Stock for which I have paid him $3,000. The understanding is that I am to give said Jones one half of whatever price the same is sold for, when sold over and above that sum.

"Dated New York, June 19, 1866.

"E. ROCKWELL."

This is one; the other is dated June 29th. The plaintiff claims that they express or imply a trust. The defendant denies this, and by his answer alleges that they were executed in pursuance of a contract by which the plaintiff "sold to said E. Rockwell, two thousand shares of stock for the price mentioned in said receipts, to wit: For each one thousand shares respectively, the sum of $3,000 and one half of whatever price the same should be sold for, when sold over and above that sum," and the finding of the trial court sustained this view of defendant. There is evidence upon which the finding may stand and the only substantial question upon this appeal is whether the plaintiff is entitled to have a sale of the stock made by the defendant.

The answer must be found in the written agreements interpreted in the light of the cardinal rule that a writing contains all that may fairly be implied from it: *Potter* v. *The Ontario and Livingston Mutual Ins. Co.*, 5 Hill, 147; *Booth et al.* v. *C. R. Mill*, 74 N. Y. 15. And thus read, I think it imports an obligation to sell, the performance of which the plaintiff may enforce. The first clause recites two facts, both past transactions: 1st. That Rockwell has received of Jones 1,000 shares of stock; and 2d. That Rockwell has paid him therefor $3,000. That something more was intended than a simple statement or declaration, and that the transaction which preceded and led to it, included more elements than a delivery and receipt of stock, and payment therefor is evident from the words "by agreement," meaning through or in consequence of an agreement. The stock or money then was not the only consideration upon which the parties acted; there was in addition an agreement, moving the one party to pay the money, and the other to deliver the stock. If, however, there was nothing more, it would appear that the agreement embraced just that transaction and the paper would stand as the record of its fulfillment. But in the second clause we find what the agreement really was. The words are those of Rockwell, an express agreement on his part, he having signed the paper, and an implied agreement on Jones' part, from his acceptance of the money and the written instrument. It thus expresses the mind of the parties: "The understanding" (that is the agreement) "is that I am to give said Jones one half of whatever price the same is sold for, when sold over and above that sum." Now here we have a promise not voluntary, as of something thrown in, but forming part of the consideration on which Jones delivered or parted with the stock. It was an inducement to the trade, as much so as the promise to pay, or the payment of the $3,000. A further promise to pay Jones the one half of whatever price the stock is sold for over and above $3,000. So much is plain enough, and this construction accords with the argument of the learned counsel for the respondent, as stated upon his printed points. He says: "It acknowledges the receipt of the stock and then states the price paid and to be paid for it." There is then no intention of a gift, but the expression of a promise upon good

consideration. The time of performance is stated. It is "when" or at the time that the stock is sold. It does not in words say that the stock shall be sold, but as Jones can have the price or consideration of his transfer from no other source, it seems manifest that both parties understand that the event should at some time happen: *Telegraph, etc., Co.* v. *McLean*, 8 L. R. Chy. (App. Cases), 658; *McIntyre* v. *Belcher*, 14 C. B. Reports (N. S.) 654. Thus only could the price be ascertained. One contingency was clearly in the minds of the parties, the possibility of a sale at a price above $3,000. Until that came to pass Jones could have no interest in a sale, and whether a sale should be made prior to that time was optional with Rockwell. It is urged by the respondent that it was also for Rockwell alone to determine at what time after that event happened, he should sell; that the exclusive right of property was in him, to be enjoyed according to his notions of his own interest or duty; that Jones trusted to his judgment and discretion, and so long as he might exercise it, could not interfere. It might be conceded that this inability on the part of Jones continued during the life of Rockwell, so that, if at any time the stock went up Rockwell might think it would go higher and prefer to wait; that he might do so, and that Jones took this risk.

It is not necessary to determine the soundness of this contention, for Rockwell is now dead and the property unsold, and because it is no longer in his power to comply with the terms of his agreement and bring about the event, on the happening of which his promise was to be performed, is the plaintiff to lose the consideration for which he bargained, or the fruition of it to be postponed until the representatives of Rockwell may in the course of administration deem it proper, or find it necessary to make a sale? or, that not occurring until the heirs or distributees of Rockwell's estate find it for their interest or pleasure to dispose of the stock and so fix a price? This would be unreasonable and might render it impossible for the plaintiff to avail himself of the advantage for which he contracted.

The cases cited by the respondent are not in conflict with this conclusion. *Lorillard* v. *Silver*, 36 N. Y. 579, turned upon the question whether the defendant was bound to accept

an offer for the property there involved; it was held he was not, and the ground upon which our judgment in the present case rests would lead to the same conclusion had the plaintiff come into court relying on a similar fact. In *Wemple* v. *Stewart*, 22 Barb. 154, and *Moffatt* v. *Laurie*, 15 Com. Bench, 583, it was clearly optional with the party sought to be charged to have the event happen or not on which the liability depended; therefore it might never happen. In the case before us, the undertaking in effect is that it shall happen. So far as the plaintiff seeks to recover, or have an account of dividends or other income received by the defendant, from or on account of the stock, he must fail. The contract does not cover them. It appears, however, that by the plaintiff's consent, a certain quantity of the stock was exchanged for bonds of the same company, Rockwell paying therefor $600 of his own money. This money, in addition to the $6,000, should be restored to him from the avails of the stock and bonds when sold, and the bonds stand in place of the stock for which they were received.

The judgment of General and Special Terms should be reversed, and a new trial ordered, costs to abide the event.

All concur, except CHURCH, Ch. J., not voting.

Judgment reversed.

DELMONICO v. ROUDEBUSH ET AL.

(2 McCrary, 18. U. S. Circuit Court, District of Colorado, 1880.)

Associate, operating in aid of third party. A part owner in a contract for the purchase of a mine can not use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates.

Division of profits. In such case, his associate is entitled to share in the property obtained by such part owner for his individual benefit through the use of such contract, in proportion to his interest in the contract so made use of.

Mixed consideration. Such claim for division will not be defeated by the fact that the property obtained by such part owner was not solely in return for the use of such contract.

Facts of the case, and result. A and B were part owners of a contract for the purchase of a claim to a mine. A used such contract for the purpose of procuring such claim for C without the consent of B,

and also secured another outstanding title for the benefit of C. In return for these services C gave A an interest in the mine. *Held*, that B was entitled to an interest in A's share of the mine proportionate to B's interest in the original contract.

M. B. CARPENTER and ELIHU ROOT, for plaintiff.

J. Y. MARSHALL, for defendants.

HALLETT, D. J.

In the month of May, 1879, Irving Howbert and others were in possession of the Robert E. Lee mine, near Leadville, and engaged in working it. These persons resided at Colorado Springs, in this State, and from that circumstance, and to distinguish them from other claimants of the same property, they are called in the pleading the Colorado Springs party. Other persons claiming adversely to the Colorado Springs party resided in Denver, and they are called in the pleadings the Denver party.

Harmon F. Lee and Charles Stockbridge constituted a third party who claimed the same mine in opposition to both the others. On the tenth of May, 1879, Lorenzo D. Roudebush, a defendant to this bill, agreed with James V. Dexter, who represented the Denver party, to purchase that title for the sum of $155,000, payable within ninety days. The agreement appears in a letter from Dexter to Roudebush, in which the former agrees to give a title bond for the property upon the payment of $10,000 on or before the seventeenth of that month. The time for such payment was afterward extended to the twenty-seventh of May. No bond was ever given in accordance with this proposal, but the $10,000 was paid, as will be hereafter stated. On the fifteenth of May, 1879, Roudebush obtained from the Colorado Springs party a bond to convey their interest in the property upon payment of $135,000 within sixty days, $10,000 of which was to be paid on or before May 16, 1879. With these papers Roudebush went to New York, arriving there about the twentieth of the same month of May, and entered into negotiations with James M. Selover, a broker, residing in that city. Such negotiation resulted in an agreement by which Selover was to furnish the money to purchase the property—amounting to $300,000—

for an interest of five eighths in the mine, Roudebush retaining three eighths. Thereupon, Selover applied to the plaintiff, Charles Delmonico, who agreed to take an interest of one sixteenth in the mine, and to pay $5,000 of the $20,000, which, as before stated, would become due under the agreements on the twenty-sixth and twenty-seventh of the month of May. Selover also applied to John P. Jones, who in turn applied to Jerome B. Chaffee, and Chaffee agreed to pay $15,000 of the $20,000 before mentioned, and to take an interest of six sixteenths in the mine for himself and Jones. These sums were accordingly paid to Selover by Delmonico and Chaffee by checks drawn on banks in New York, and these checks were turned over to Roudebush and by him applied to the payment of the sums falling due under the agreement aforesaid on the twenty-sixth and twenty-seventh of May.

To determine the relations of the several parties at this point of time, that is to say, after $10,000 had been paid on each of the agreements, it may be useful to recount that Roudebush had obtained an agreement to purchase the interest of the Denver party for the sum of $155,000, payable on or before August 8, 1879, of which $10,000 had been paid out of the money furnished by Delmonico and Chaffee; that Roudebush had also an agreement to purchase the interest of the Colorado Springs party for the sum of $135,000, payable on or before July 15, 1879, of which sum $10,000 had been paid out of the moneys furnished by the same parties; and the property, when purchased, was to be held by the parties as follows, that is to say: Chaffee, three sixteenths; Jones, three sixteenths; Delmonico, one sixteenth; Selover, three sixteenths, and Roudebush six sixteenths. Some changes were afterward made in the stipulations of the parties, not very material to be noticed in this connection, as that the amount of the purchase money to the Denver party was reduced by $50,000, making the aggregate to be paid to that party only $115,000; and Chaffee's interest in the property was enlarged by contributions from Selover and Roudebush. But the interest of the plaintiff was not in any way changed by these negotiations, and all the parties named retained some interest in the contracts as intending purchasers.

At the time the arrangement with Delmonico and Chaffee

was made, it seems that some hope was entertained that the purchasers would be able to obtain possession of the property upon the payment of the $20,000; and that they would be able to take from the mine the balance of the purchase money within the time limited for its payment. But there was nothing in the agreement to warrant such expectation; and, in fact, the bond of the Colorado Springs party expressly provided that the grantors should retain possession until final payment should be made.

Soon after the payment of the money, and probably about the first of June, 1879, application was made to the Colorado Springs party to deliver possession to the purchasers, which application was refused; and then, if not before, it must have been known that the entire sum would have to be raised to complete the purchase. Upon this it seems to have been understood that Chaffee and Delmonico would pay the entire amount—the latter according to the interest to be acquired by him, one sixteenth of the whole, and Chaffee to pay the remainder.

Before the money became due to the Colorado Springs party, Jones and Chaffee came to the State apparently with the view to complete the purchase, and after some examination of the property and the title to it, Chaffee declined to go on, upon the ground that the Lee and Stockbridge title was outstanding; and thereupon it is conceded that the contract with the Colorado Springs party expired by its own limitation. Some time remained—that is to say, until the eighth of August—before the contract with the Denver party would expire, and in this interval Roudebush entered into negotiations with the Denver party with a view to acquire their interest for the Colorado Springs party. He also arranged for the sale of the Lee and Stockbridge title to the Colorado Springs party, and this probably entered into the purchase of the Denver party's title. The evidence is not clear on that point, but it is shown that $10,000 was paid for the Lee and Stockbridge title, of which the Denver party contributed one half, and the Colorado Springs party one half; and probably this arrangement could not have been made except upon some understanding as to the settlement of all controversies between the parties. It is hard to believe that these two parties

would have come together to purchase the Lee and Stockbridge title without some accommodation of the controversies then pending between them.

In the last days of July, the sale by the Denver party to the Colorado Springs party was effected through the agency of Roudebush, and the principal question in the case is whether this was done pursuant to the contract between Roudebush and the Denver party. Upon that question there are several circumstances of great weight. Although the contract was not completed by the conveyance from the Denver party to the Colorado Springs party until some time afterward, the agreement was, in fact, made during the life of that contract; that is to say, before the eighth day of August, 1879. And, at the time the agreement was made, Roudebush was in a position to enforce a conveyance of the property from the Denver party. The sum paid for the property was precisely that specified in the contract with Roudebush. And as both parties to the agreement had received large sums of money under the old contracts, it is reasonable to believe that they would deal with each other more favorably on account of such payments. Roudebush, as a defendant in the suit and a witness in the cause, does not claim that any new arrangement was made between the contracting parties, or that the sale was other and different from that specified in the contract between himself and the Denver party. During the pendency of the contract with the Colorado Springs party, that party had been in possession of the property and had ascertained that it was of great value, and they were gratified with the failure of that contract, and anxious to purchase the adverse titles of the Denver party and the Lee and Stockbridge party. So anxious were they that they agreed to give, and did give, to Roudebush one fifth interest in the property for his services in getting in those titles. All the circumstances of the transaction by which the Colorado Springs party acquired full title to the property lead to the conclusion that the contract with the Denver party was used to bring about that result. In that way the defendant, Roudebush, gained an interest of one fifth in the property, and the question for consideration is whether he shall be allowed to retain that interest as against the plaintiff, who was jointly interested with him in the contract with the Denver party.

In admitting Chaffee and Delmonico to an interest in the contracts in May, and in receiving from them the $20,000 with which to make the first payments under those contracts, it is apparent that Roudebush became in some sense a trustee for them in the further execution of the contracts. Those instruments were made with him personally, and upon the face of them he alone could enforce their terms. Until the money was paid which was furnished by Chaffee and Delmonico, the contracts had no force or effect, so that Roudebush was indebted to them in a substantial way for his position under those instruments. Whatever may be said of the position of Jones and Selover in the transaction, the relations of Chaffee, Delmonico and Roudebush are not doubtful. They were engaged in a common enterprise, in which each was bound to use good faith toward the other. And this was especially true of Roudebush, who held in his own name the contracts in which all of them were interested. The principle which obtains amongst partners, that all members of the partnership shall be loyal to the joint concerns, extends to those who are negotiating for partnership, to the members of joint stock associations, to the directors of corporations, and others who are in the same position of trust and confidence: Collyer on Partnership, 6th ed. 255, and note.

It is believed that the same rule is applicable to all persons who may be engaged in a common undertaking, and any of the associates are entrusted with the interests of the association. Certainly it can not be said that of several associates, one may turn the joint concerns or property to his own advantage, without the consent of the others. Whatever the relations of the parties may be, if they have united for a common purpose they must be loyal to that purpose, and no one or more of the number can, without the consent of his associates, appropriate to his own use the property of all. The use of the contract with the Denver party to secure the title of the property in the Colorado Springs party was a conversion by Roudebush of the property of his associates, which equity will not sanction. It matters not that by his own limitation the contract would soon expire and thus become lost to the plaintiff. There is nothing to show that the plaintiff would have furnished the money to be paid under that

contract, in order to acquire the title of the Denver party; and without such payment the contract must have failed, and all benefit and advantage therefrom would have been lost to plaintiff. But the fact remains that at the time of the appropriation by Roudebush the plaintiff was interested in the contract, and the use of it by Roudebush was without his consent. This is enough to enable the plaintiff to share in the advantages secured by Roudebush from the use of the contract. And the circumstance that something more than securing the title of the Denver party was done by Roudebush, will not defeat that claim. It seems that Roudebush obtained the Lee and Stockbridge title also for the Colorado Springs party, but, in a case of this kind, the court will not consider whether there were other elements in the transaction than those upon which the plaintiff may rely. The ground of relief is the wrong done to the plaintiff in the use of his means, and if other considerations entered into the transaction, the plaintiff will not be defeated for that reason, and so it must be said that the plaintiff is entitled to share in the property obtained by Roudebush through the use of the contract with the Denver party, in which the plaintiff was interested. He claims one sixteenth interest in the mine, according to the terms of his original contract; but as the contracts of purchase were not carried out, and could not be from the failure to pay the purchase money, there is nothing to support that claim. It is more just to say that the plaintiff had an interest of one sixteenth in the contract with the Denver party and that he is entitled to share to that extent in the avails of that contract obtained by Roudebush. Upon the settlement with the Colorado Springs party, it seems that Roudebush was given an interest in the mine of one fifth, and the plaintiff is entitled to one sixteenth of that interest.

The cause will be referred to a master to ascertain what income has been received from the mine by Roudebush and Pennock; and when his report shall come in, a decree will be entered for one sixteenth of the net income from the one fifth interest, and for a conveyance of one sixteenth of the said one fifth.

LAMBERT v. FULLER.

(88 Illinois, 261. Supreme Court, 1878.)

Prospecting drill contract—Abandonment after assured indications of no coal. When under a written contract plaintiff was to make a drill hole for an agreed consideration, with a proviso that if plaintiff should "strike what is known as conglomerate or iron stone before he reached 300 feet he might abandon the work," in which event he was to be paid a ratable proportion of the price, and by another provision plaintiff at the option of defendant was to bore any number of feet not exceeding 400 at $4 per foot beyond 300 feet, and it appeared that the object was to find coal, and that coal was never found under the iron stone, it was *held*, that plaintiff could abandon on finding iron stone, no matter at what depth, and that the option contained in the latter clause was contingent upon such deposit not being first reached.

Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

This was an action of *assumpsit*, brought by George W. Fuller against Edward Lambert, to recover the contract price for boring, drilling and tubing a hole on defendant's land, 211 feet and 7 inches deep, in prospecting for coal. At that depth the plaintiff struck conglomerate or iron stone, and quit the work, notwithstanding the defendant required him to bore further, and the question of his right to do so and recover depends upon the construction to be given to the contract under which the work was done, and which is stated in the opinion of the court. The trial resulted in a verdict and judgment in favor of the plaintiff, to reverse which judgment the defendant appealed to this court.

MORRISON, WHITLOCK & LIPPINCOTT, and J. T. SPRINGER, for the appellant.

KETCHAM & TAYLOR, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court.

The written contract between the parties obliged plaintiff to bore, drill and tube a hole, of the diameter of two inches, on the land of defendant, at a point to be indicated, at

and for a compensation agreed upon; provided, however, if plaintiff "should strike what is known as conglomerate or iron stone before he reached 300 feet, he may abandon the work," but in that event he was only to receive a ratable proportion of the contract price. By another provision of the contract, plaintiff, at the option of the defendant, was to bore any number of feet, not exceeding 400, at the rate of $4 per foot above 300 feet.

After boring to the depth of 211 feet and 7 inches, plaintiff came to that rock formation specified in the contract as "conglomerate or iron stone," which he insists gave him the right to abandon the work, and recover the contract price for the number of feet of boring and tubing actually done. On the other hand, defendant contends it was plaintiff's duty, at his election, which he had made known to him, to still prosecute the work to greater depths, and the principal question discussed is, whether, under the contract, he was bound to do so.

Construing the agreement in the light of the circumstances which surrounded the parties at the time, we think plaintiff was at liberty to abandon the work on coming to that description of rock formation specified in the contract, no matter at what depth it was found. The object the parties had in view was to ascertain whether the earth, at that point, contained coal deposits, and it seems to be conceded that beneath that class of rock designated, coal is never found. There was then, clearly, no necessity for boring further, and it would have been a wasteful expenditure of money to do so. Plainly, the option reserved to defendant, to have the boring continued any number of feet not exceeding 400, was contingent upon the event "conglomerate or iron stone" should not be first reached. This, it seems to us, is what the contract really means, and any other construction would make it obligatory to do a useless thing, requiring the expenditure of a large sum of money, which the parties certainly never contemplated when the work was undertaken. The very object of the limitation clause of the contract was, that the work might be abandoned when it should be discovered it would be profitless to further prosecute it. It was the interest of both parties it should cease then.

The ninth instruction, given for plaintiff, is in harmony

with this construction of the contract, and there was no error in giving it; and as the fourth instruction, asked by defendant, gave a different construction to the agreement, it was properly refused.

Whether the hole bored was two inches in diameter, or whether there had been any adjustment of the matters in dispute between the parties, before suit brought, were questions of fact for the jury; and as the evidence offered was conflicting in the extreme, we are unwilling to disturb the verdict. If the jury gave credit to the testimony of plaintiff, there is abundant evidence to sustain the finding. It was their province to say which was the better evidence, and entitled to most weight; and as we see no abuse of that discretion with which a jury is clothed in such matters, the judgment must be affirmed.

Judgment affirmed.

WOLF v. MARSH.

(54 California, 228. Supreme Court, 1880.)

Condition—Statute of limitations. M. promised in writing to pay $449 to W., providing, however, that the note should be void if certain coal mines failed to yield a profit to M.; he sold the mines before they yielded a profit. *Held*, that a cause of action accrued against M. immediately upon the sale, because he then voluntarily put it out of his power ever to realize a profit from the mines. *Held*, also, that the statute of limitation began to run from the date of the sale.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

The court below found that the instrument set out in the opinion was given and accepted in lieu of and for the balance due upon the original note of Marsh to Wolf, and rendered judgment for the latter, from which defendant appealed.

PRINGLE & HAYNE, for appellant.

LEONARD REYNOLDS, for respondent.

SHARPSTEIN, J.

This is an action upon an instrument in writing, of which the following is a copy:

"[449.00.] MARTINEZ, November 24, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars with interest at one per cent. per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"(Signed) C. P. MARSH."

It appears by the pleadings, evidence, and findings, that at date of this instrument, and thereafter until the 1st day of November, 1871, the defendant was the owner of the one undivided half of said ranch, and that the coal mines which it contained were under lease to the "Poso Coal Company," at a rent of thirty-three cents per ton for each ton of coal that might be taken from said mines. That up to said first day of November, 1871, the mines had yielded the defendant no profits, and that on the last-named day the defendant conveyed his entire interest in the ranch, including the mines, to one Williams. This action was commenced within four years after the date of said conveyance. There was a demurrer to the complaint, on the grounds, 1st. That it did not state facts sufficient to constitute a cause of action; and, 2d. That the cause of action was barred by the provisions of § 337 of the Code of Civil Procedure. The demurrer was overruled, and the defendant answered the complaint. The case was regularly tried by the court, which rendered its judgment in favor of the plaintiff. The defendant moved, on a bill of exceptions, for a new trial, which was denied; and from that judgment, and the order denying the motion for a new trial, the defendant appealed to this court. The grounds upon which the appellant here seeks to have the judgment and order reversed are, that the action is barred by the statute of limitations, and that it is not proved or found that the coal mines in the Marsh Ranch have ever yielded any profit.

Upon the point that the action was barred by the statute

of limitations, it is sufficient to remark, that we are unable to discover any ground upon which that point can be sustained; and if we are right in the view which we take of the other point, it must be apparent that the statute did not commence running more than four years before the commencement of this action. The instrument sued upon consists of two parts: a promissory note, and a condition upon which it was not to be paid, but to be null and void. That condition was, that the coal mines in the Marsh Ranch should yield no profits to the defendant. If they at any time should yield profits to him, the note would then become due and payable. From that time the statute of limitations would commence to run, because at that time a cause of action would accrue upon the note. Prior to the 1st day of November, 1871, the date of defendant's conveyance to Williams, the mines had yielded no profits to defendant, and if he had retained his interest in them up to this time, or for any length of time, without their yielding any profits to him, no cause of action would have accrued upon the note. But, as before remarked, upon the mines yielding profits to the defendant, the note became due and payable *eo instante*.

Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired": Bishop on Cont. § 690.

That this case is within that principle, we do not entertain a doubt. When the note was executed, the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was com-

menced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.

Judgment affirmed.

THORNTON, P. J., and MYRICK, J., concurred.

SARGENT v. THE LINDEN MINING COMPANY.

(55 California, 204. Supreme Court, 1880.)

Instruction at variance with evidence. The court instructed the jury in substance as follows: If plaintiff went upon defendant's mine to work in June, 1876, with the understanding with defendant that he was to receive reasonable wages from the mine itself, without looking to the company personally, and after doing preparatory work the plaintiff was discharged without cause before he had taken out reasonable wages, the company is liable to the plaintiff for such reasonable wages less the amount received from the mine.

The evidence showed that there was no such agreement prior to July 5, 1877, but that plaintiff had worked the mine up to that time with the knowledge of the company, and without objection, after which there was some such oral understanding. *Held*, that the court had no right to extend such contract back to the 6th of June, 1876, and that the instruction was not authorized by the pleadings and evidence.

Appeal from a judgment for plaintiff, and from an order denying a new trial in the District Court of El Dorado County, Eleventh Judicial District.

CHARLES F. IRWIN, for appellant.

GEO. G. BLANCHARD and W. W. LIKENS, for respondent.

MORRISON, C. J.

The complaint in this case contains two counts, the first averring that on the 15th day of November, 1877, the defendant was indebted to plaintiff in the sum of $873.43, balance due on an account for work and labor done and services rendered by plaintiff to the defendant, at defendant's special instance and request, in and about a certain mining claim, between the 6th day of June, 1876, and the 15th day of November, 1877; and the second being substantially the same

with the additional averment that the work and labor done and services rendered were reasonably worth the sum of $873.43. The case was tried before a jury, and a verdict was rendered in favor of plaintiff for the amount claimed. The appeal is taken from the judgment, and order of the court denying defendant's motion for a new trial. Numerous errors are assigned on the appeal, only one of which will be noticed, and that is sufficient to call for a reversal of the judgment.

When the evidence was closed, and before the cause was submitted, the court below, at the request of the plaintiff, gave the following instruction to the jury:

"If the plaintiff went upon the defendant's mine to work in June, 1876, with the understanding and consent with defendant that he should take what is called 'bed-rock' pay, and that the meaning of 'bed-rock' pay is that plaintiff should receive reasonable wages or pay from the mine itself, without looking to the company personally, and that plaintiff with this understanding and consent was compelled, with the knowledge of defendant, to sink a shaft and run drain drifts, which is dead-work, and did run such drain drifts, tunnel, and sink shafts at considerable expense, then, if the defendant discharged plaintiff before he had taken out reasonable wages or pay without any good cause, it is liable to plaintiff for such reasonable wages, less the amount he has received from said mine prior to such discharge."

It seems to us that the theory of the plaintiff's case, suggested and presented by the foregoing instruction, is a substantial departure from the case made by the pleadings and the evidence. As already stated, the complaint contains two counts, both of which are in *indebitatus assumpsit*, and founded on a contract to pay plaintiff so much money for work and labor done and performed by him at defendant's special instance and request, and the evidence offered by the plaintiff was introduced for the purpose of sustaining this theory.

The plaintiff testified on the trial as follows: "There was no agreement between me and the trustees relative to my working the mine. I had no express agreement with the trustees, is what I mean by not having an agreement; but

they knew that I was at work, and made no objection. One of the trustees worked with me, and others were anxious to know the progress we were making in working the mine. There was no express understanding or agreement between me and the company as to how much *I was to receive, or how I was to receive it*, prior to July 5, 1877. Since July 5, 1877, the understanding was that those who desired could continue to work the same as before, and should receive two dollars and a half per day when it came out, from the proceeds of the mine, after first paying the working expenses, it being provided that we were to continue to have work. No time was specified that we were to have work. The only chance for me to get my pay was to be out of the mine. My understanding of the agreement was, that we were to continue to work until we got our pay."

There is no pretense that any agreement to pay the plaintiff out of the proceeds of the mine was made prior to the 5th day of July, 1877, and the ground upon which plaintiff based his right of recovery for services rendered by him before July 5th was, that he worked upon defendant's mining ground with the knowledge of the officers of the company. If the plaintiff performed work and labor upon the defendant's mine under circumstances which would make the company liable, that liability would simply be to pay plaintiff what such services were reasonably worth. But the instruction of the court went upon an entirely different theory of the case, and by it the jury was told that if the agreement was that plaintiff was to be compensated for his services from June, 1876, down to November, 1877, out of the proceeds of the mine, and if, before such proceeds yielded such compensation, defendant discharged plaintiff without good and sufficient cause, he had a right to recover what such services were reasonably worth.

The pleadings and the evidence did not authorize the instruction. There must have been an express contract between the company and plaintiff, that he should be allowed to work the mine for a definite or an indefinite time and pay himself out of the proceeds thereof, for the law would not make such a contract by implication; and it is not pretended that any such contract was made, or that any understanding to that effect existed before the 5th day of July, 1877. The court,

therefore, had no right to extend such contract back to the 6th day of June, 1876.

For the error committed by the court in giving the instruction complained of, the judgment and order denying defendant's motion for a new trial are reversed.

MCKINSTRY, J., and ROSS, J., concurred.

TOOMBS v. THE CONSOLIDATED POE MINING COMPANY ET AL.

(15 Nevada, 444. Supreme Court, 1880.)

Conditional agreement—Vendor's lien. In settlement for extra work done by plaintiff in the building of a quartz mill for the defendant, and in consideration of a conveyance by plaintiff to defendant of his interest in the mill, the defendant agreed to pay plaintiff $2,575 out of the first net proceeds of crushing and reducing ores of gold and silver in said mill, from the defendant's mine; the debt not to be otherwise collectible until there were such net profits. There were no such profits. *Held*, that plaintiff had no right of action for the $2,575, nor for the enforcement of a vendor's lien against the mill.

Appeal from the District Court of Washoe County, Second Judicial District.

W. WEBSTER and W. L. KNOX, for appellant.

C. S. VARIAN, for respondent Briggs.

LEONARD, J.

This is a suit to enforce a vendor's lien upon a certain quartz mill and mill-site. The Poe Company, a corporation, and defendant, Briggs, demurred separately to the complaint. Both demurrers were sustained, and as to defendant, Briggs, the suit was dismissed. Plaintiff was granted leave to amend his complaint as to the Poe Company, but refusing to do so, the suit was dismissed as to that company also. If we mistake not, a consideration of one of the many points made, will prove decisive of the appeal. From the complaint we gather the following facts:

On the sixth day of August, 1873, the owners of the Consolidated Poe Mining Company, then unincorporated, entered into a written contract with plaintiff, whereby it was agreed that the latter should build a quartz mill, at an estimated cost of ten thousand dollars, for the purpose of working the ores of the company's mines, the mill, when completed to be the property of plaintiff and the members of the Poe Company. Subsequently, the Consolidated Poe Mining Company was incorporated under the same name, with plaintiff's consent. Plaintiff built the mill, and after the incorporation, it was accepted by the proper officers of the company. Plaintiff was paid the estimated cost, and by an instrument under seal, called therein a "deed and act of settlement between the parties," it was agreed on the third day of December, 1873, that the mill had cost five thousand dollars more than the original estimate, and, in satisfaction of that amount the following stipulation was inserted in, and made a part of the conveyance from plaintiff to the Poe Company, to wit:

"Said first party (Poe Company) hereby agrees and covenants that out of the first proceeds of crushing and reducing ores of gold and silver in said mill, from its said mine, after the payment of the expenses of working its said mill and mine, it will pay to the second party (plaintiff), his heirs or assigns, the sum of two thousand five hundred and seventy-five dollars, in United States gold coin, with interest thereon, until the payment of such interest and principal of the note of —— per centum per month from date of these presents; but such sum of two thousand five hundred and seventy-five dollars shall not be a debt otherwise collectible of the first party, until the proceeds of its mill and mine, over expenses, will pay such sum and interest, or part thereof, and then only to the extent of such part over such expenses. In consideration of the foregoing covenants of the first party, and the covenants of the second party, in said written instrument, and the settlement herein made and contemplated, the second party hereby bargains, sells, grants, and conveys unto the first party all the right, title, interest, and estate to said stamp quartz mill and all the machinery thereof," etc.

Then follows a conveyance of plaintiff 's right of possession and occupation in and to the lands occupied by the parties for milling and mining purposes.

Thus it appears that so far as the extras are concerned (and this suit is to enforce a vendor's lien for them only), the consideration of the conveyance was the settlement stated; that is to say, it was the agreement on the part of the Poe Company to pay plaintiff the sum of two thousand five hundred and seventy-five dollars out of the first net proceeds of ores from its mine, crushed and reduced at its mill; and, on the part of the plaintiff, that said sum should not be a debt otherwise collectible of the Poe Company, until there were net profits, and then only to the extent thereof. The company agreed to pay, and the plaintiff to receive, the amount agreed upon, out of the net proceeds, and not otherwise. If there should be no such proceeds nothing was to be due or payable; and, outside of the original estimate, the ten thousand dollars which were paid, that agreement and the rights given thereby formed the consideration of the conveyance. Plaintiff took his chances upon the net proceeds, and the company made itself liable in a certain event only.

It is admitted that there have been no proceeds after payment of the expenses; and, more than that, it appears that the proceeds have fallen far short of paying the actual expenses.

Such being the case, it is plain that there is nothing due or payable from the company to plaintiff, unless there are facts alleged which relieve plaintiff from the consequences of his agreement, and enable him to pursue the remedy now sought as he might have done, if the transaction had been an ordinary sale and purchase without payment of the purchase money.

We express no opinion as to what plaintiff's rights or remedies would have been, if the inability to pay from the net proceeds had been caused by the fault of the company, because that is not alleged or claimed. It was the duty of the company, under the covenants stated in the deed, to work the mine, and by proper means extract the gold and silver from the ores. It is alleged that both parties fully believed the sum of two thousand five hundred and seventy-five dollars and interest, besides working expenses, would be realized from the ores, but that they proved very base and refractory, and that both plaintiff and the company were deceived; that, contrary to the expectations of both

parties, the ores were more refractory and base than any others on the Pacific coast; that the company, after expending large sums of money in tests and experiments, and in building furnaces and other appliances for the reduction of said ores, from December, 1873, to and including the summer of 1876, abandoned further efforts to work its ores and mines; that the company not only expended large sums of money in working the mine and reducing the ores, but that, in time, it became largely indebted for supplies, labor, and money, expended in its business of mining and working ores; to secure which it mortgaged its mines, and the mill and mill-site in question, for about five thousand dollars; that being unable to pay said mortgage indebtedness, or any part thereof, it suffered a sale of its entire property under an order and decree of a competent court, on the seventh day of March, 1878, at the suit of defendant, Briggs, for the sum of eight thousand and nine dollars; that the company is hopelessly insolvent, being largely indebted to other persons; that for the purpose of complying with his covenants, plaintiff has waited until all reasonable assurance of receiving payment in the manner agreed, and from the sources stipulated, has ceased, and until the company, by its own acts and inability to pay, has been deprived of its means of complying with its covenants to pay plaintiff from the profits and proceeds of its mine and mill.

The above are all the facts stated, from which it is, or can be, claimed that plaintiff has a right of action either for money due, or for the enforcement of a vendor's lien. If, under the contract, plaintiff has no right of action to recover a money judgment, it follows, of course, that he can not maintain this suit to enforce the lien claimed. The existence of a debt due as purchase money, is a condition precedent to a right of action to enforce the lien.

It is not alleged, nor does it anywhere appear, that the Poe Company failed to do anything which it should have done, or did anything which it ought not to have done, under its contract. There is no allegation of fraudulent acts, or even of errors in judgment. It worked its mines, and reduced its ores, as it agreed to do. In so acting, debts were contracted which it was unable to pay, and the result was a forced sale

of its property. Nothing appears which indicates aught but an honest desire and a long-continued effort on its part to carry out its contract. The property was sold as stated, but no fault is ascribed to the company in being unable to avert that disaster.

It is alleged that, after working the mine and running the mill some three years, further efforts were abandoned; but it is not charged that the company, under the circumstances, ought to have continued its work, or that it could have done so with profit.

Under the contract, the only condition that could make the claim upon which this suit is based an enforceable debt does not exist, and no facts are stated which relieve the plaintiff of the necessity of showing the existence of that condition, in order to maintain his suit against either defendant.

The complaint does not state a cause of action, and the judgment appealed from is affirmed.

1. Agreement to pay purchase money out of the mine proceeds: *Anspach* v. *Bast*, 52 Pa. St. 356; *Post* PLEADING.

2. Contract in excess of agent's authority: *Atlas Co.* v. *Johnston*, 1 M. R. 388.

3. Enforcement of contract *ultra vires* where a benefit has been received: *Bradley* v. *Ballard*, 55 Ill. 413.

4. Contract of corporation good without corporate seal: *Crowley* v. *Genesee Co.*, 55 Cal. 273; *Post* CORPORATION.

5. Agreement of corporation to sell its shares at less than *par* is valid: *Otter* v. *Brevoort Co.*, 50 Barb. 247.

6. Power of corporate officers to contract with the company: *Harts* v. *Brown*, 77 Ill. 226; *Post* CORPORATION.

7. Contract of one mining company to pay the debts of another, made for good consideration, is valid: *Morgan* v. *Overman Co.*, 37 Cal. 534.

8. Husband placing wife's signature to mining agreement without authority: *Boyd* v. *Merriell*, 52 Ill. 151; *Post* MARRIED WOMEN.

9. Note of married woman given in purchase of mining stock, enforced as a debt contracted upon the credit of her estate: *Williams* v. *King*, 43 Conn. 569; *Post* MARRIED WOMEN.

10. Contracts between corporations and their officers relating to payment for official services: *Carr* v. *Chartiers Co.* 3 M. R. 476; *Merrick* v. *Peru Co.* 3 M. R. 584; *Santa Clara Ass'n* v. *Meredith*, 4 M. R. 44.

11. Contract to quarry, enforced between the contracting parties, without regard to outside owners, not parties to the contract: *Clemens* v. *Conrad*, 19 Mich. 170.

12. Failure to deliver coal is a defense to a draft given on account of payment: *Eckel* v. *Murphy*, 15. St. 488.

13. In a contract to deliver coal it is for the vendor to show an offer or tender of the coal—not for the vendee to prove a demand: *Rowland* v. *Lehigh Co.*, 28 Pa. St. 215.

14. For the construction of coal delivery contracts containing clauses guarding against strikes and accidents. See *Rowland* v. *Lehigh Co.*, 28 Pa. St. 215; *Oakman* v. *Boyce*, 100 Mass. 477; *1,100 Tons of Coal*, 12 Fed. 185.

15. Peculiar contract to supply 500 tons of coal weekly, the contract being drawn with reference to defendant's ability to supply, construed in its general scope under the rule that no special form of words is essential to constitute a covenant: *Wood* v. *Copper Miners*, 7 C. B. 906.

16. Contract for coal carriage in cars broken, plaintiff compelled to use horse power: *Pittsburg Co.* v. *Foster*, 59 Pa. St. 365; *Post* MEASURE OF DAMAGES.

17. Specific enforcement of contract for lease on thin coal seams, entered into after personal examination of premises: *Haywood* v. *Cope*, 25 Beav. 140; *Post* FRAUD.

18. Monopoly contract between coal corporation in restraint of trade: *Morris Co.* v. *Barclay Co.*, 63 Pa. St. 173.

19. Contract between railroad and colliery to mine under road bed: *Mine Hill Co.* v. *Lippincott*, 86 Pa. St. 468; *Post* RAILROAD.

20. Delivery of coal when not complete: *Sneathen* v. *Grubbs*, 88 Pa. St. 147; *Post* DELIVERY.

21. Burning of petroleum while in the act of delivery: *Rochester Co.* v. *Hughey*, 56 Pa. St. 322; *Post* DELIVERY.

22. Taking the benefit of an indorsement implies a request to indorse; money paid on indorsements recoverable by action on book account: *Flint* v. *Eureka Co.*, 53 Vt. 669; *Post* PARTNER.

23. Agreement to influence miners to trade at a certain store, *held*, in restraint of trade: *Crawford* v. *Wick*, 18 Oh. St. 190; *Post* LEASE.

24. Contract not reciprocal—a license or option to the vendee will not be specifically enforced: *Geiger* v. *Green*, 4 Gill. 472: *Post* SPECIFIC PERFORMANCE.

25. Where written contract with sureties is stipulated for, there is no contract till these conditions are fulfilled: *Morrill* v. *Tehama Co.*, 10 Nev. 125.

26. Ditch contract payable in water: *Myers* v. *South Co.*, 14 Cal. 269; *Post* DITCH.

27. Cases involving time as of the essence of the contract: *Willis* v. *Forney*, 1 Barb. Eq. 256; *Post* TIME; *Hargrave* v. *Smith*, 1 Ph. Eq. 165; *Post* TIME; *Hawley* v. *Brumagim*, 33 Cal. 394; *Post* STOCK; *Higgins* v. *Delaware Co.*, 60 N. Y. 553.

28. When there are two vendees, both in good faith, the first in possession of the property (coal) will hold it: *Winslow* v. *Leonard*, 24 Pa. St. 14.

29. Purchase of goods after sight (mining pump) excludes idea of implied warranty: *Getty* v. *Rountree*, 2 Pinney (Wisc.) 379.

30. A mining company settled a debt by a transfer of its copper produce, agreeing at the time to a conditional liability for the amount not re-

alized out of the copper. *Held*, a new contract, and not recoverable upon the common counts: *Pennsylvania Co.* v. *Brady*, 14 Mich. 260, 16 *Id.* 322.

31. In stock contracts quantity is equivalent to identity: *Hawley* v. *Brumagim*, 33 Cal. 394; *Post* STOCK.

32. Agreement where vendor is to designate the point to dig or mine and refuses so to do: *Hurd* v. *Gill*, 45 N. Y. 341; *Post* LICENSE.

33. Proof of "extra work" not allowable in suit on original contract: *Hinkle* v. *San Francisco Co.*, 55 Cal. 627; *Post* EVIDENCE.

34. Suit by mining superintendent quitting before time expired: *Isaacs* v. *McAndrew*, 1 Mont. 437; *Post* MASTER AND SERVANT.

MEYERS v. FARQUHARSON ET AL.

(46 California, 190. Supreme Court, 1873.)

Bill of sale to mining claim—Intent. No precise form of words is necessary in a bill of sale. If it be clear that the maker intended to make a bill of sale, and to pass thereby the title to property, the law will, if possible, so construe the words used as to effectuate that intent.

Description—Identification of monuments. The following description of a mining claim in a bill of sale "commencing at an oak bush near the gate of Myer's cow-yard, running straight across the river to the head of the wing dam, put in by Owens & Co., in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line," no State mentioned. *Held*, sufficient to allow the paper to be received in evidence, as the points mentioned might be well known monuments easily found and distinguished.

Gift—Evidence. A bill of sale of a mining claim should not be rejected as evidence because it is given without consideration, when, so far as the court knows, the owner has a full right to give away the claim.

Probate sale of mortgaged property. The Probate Court has no power to foreclose a mortgage, and sales of mortgaged property made under its orders pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired; the purchaser at such sale can not take by relation the title which the decedent had at the date of the mortgage.

Title by gift. The title to a mining claim obtained by gift can not be assailed by one who is neither a creditor of the grantor, nor in the place of creditors.

Trespass against one in peaceable possession. An action for damages for trespass will lie against one who has been in the exclusive and peaceable possession of property for a month or more if his first entry was that of a trespasser.

Appeal from the District Court of Placer County, Fourteenth Judicial District.

The plaintiff averred in his complaint that in January, 1868, and thence to June, 1869, he had been and still was the owner of and entitled to possess, and in the possession of the mining claim in dispute, and that about the 21st of April, 1870, while he was still the owner of and in possession of the claims, the defendants entered and commenced washing away the earth and gravel, and extracting the gold therefrom. The complaint was filed June 25, 1870.

The answer not only denied the plaintiff's ownership, but denied that he was ever in possession of the ground in dispute.

The defendants on the trial introduced testimony tending to show that the plaintiff had not been in possession of the ground in dispute, or performed any work thereon, since the death of Hudson, on the 18th of April, 1869, and that the claim had been in the possession of Hudson's executors after his death, up to December, 1869, when the executors sold to Burt & Brother, who took possession and retained it until February 2, 1870, when they sold to defendant Farquharson, who took and had since retained possession.

The defendants, on the trial, offered to prove that in November, 1868, James Hudson being indebted to B. D. Burt and S. B. Burt, executed to said Burts, to secure said debt, a mortgage on the Willow Bar Claims, including the ground in dispute, which was within ten days thereafter recorded in the office of the recorder of El Dorado county, in which the claims, a part of them, lie; and that said Hudson died in April, 1869, leaving a will, by which he appointed B. D. Dunnam and J. Diltz his executors, and in said will directed his said executors to sell his property and pay his debts; which will was afterward duly probated in the Probate Court of El Dorado county, of which county said Hudson was a resident when he died; and that afterward said executors and the probate judge allowed said debt as a claim against his estate, and obtained an order of said court for the sale of said property to pay the debts of the testator, and sold the said mortgaged property; and by an order of said court the proceeds of sale were applied to said debt thus secured by mortgage, and said Burts became the purchasers, and the sale was approved by said court; and afterward, and on the 10th day of December, 1869, said executors executed to said Burts a deed, as executors, under said sale of said Hudson's interest in said property; and said Burts, afterward, on the 2d day of February, 1870, sold said property, by deed, to Farquharson and Rosetti, who now claim to own the same. Under said deed it was claimed by defendant that this sale by the Probate Court amounted to a foreclosure of said mortgage, and gave said Burts all the title the testator had when he executed the mortgage.

Plaintiff objected to the testimony as irrelevant, and that the evidence did not show, or tend to show, that the Burts, by the deed, acquired any title, except what was in Hudson at the time of his death.

The court sustained the objection, and the defendants excepted.

The court, in its opinion, has treated the case as though the foregoing evidence had been received by the court below. The principles involved are not affected, however, by the manner of treating the case.

The plaintiff recovered judgment, and the defendants appealed.

C. A. TUTTLE and W. H. BULLOCK, for appellants

HALE & CRAIG, for respondent.

BELCHER, J.

This is an action to recover damages for certain trespasses alleged to have been committed upon the plaintiff's mining claim. The defendants deny the plaintiff's title to the claim, and set up title in themselves. It is admitted that the claim in dispute is a part of a larger claim, known as the Willow Bar claim, which formerly belonged to one James Hudson, under whom both parties claim title. To establish his own title, the plaintiff proved that in January, 1868, Hudson made a verbal sale of the claim to him, and in the August following, placed him in possession of it, and that he then began to mine on the claim, and continued mining there until November, when he was stopped by high water. He also proved that in March, 1869, Hudson made and delivered to him a bill of sale, which reads as follows:

"MICHIGAN BLUFF, March 9, 1869.

"This is to certify that on or about the 1st day of January, 1868, that I presented to and sold C. G. Myers, and on or about the 1st of July, 1868, did give the said C. G. Myers possession, by a verbal agreement, of a certain piece of ground; and, to avoid further trouble in regard to said claim, I do this day give him a clear bill of sale, defining the lines as before, thus: Commencing at an oak bush near the gate of Myers'

cow-yard, running straight across the river to the head of the wing-dam put in by Owens & Co., in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line; to have and to hold the same, his heirs, assigns forever. The said C. G. Myers agrees to not back the water, or interfere with the above ground in shape or manner belonging to me, and known as the Willow Bar claim.

"Witness my hand: JAMES HUDSON.

"Witness: ED. BLIFKA."

The defendants objected to this paper being received in evidence, on the ground that it appeared upon its face to be void for uncertainty, and to be a gift without consideration. The court overruled the objection, and we think rightly. It is claimed that it is uncertain, because it uses no words of conveyance, and because it does not state in what township, county or State the property is situated. No precise form of words is necessary in a bill of sale. If it be clear that the maker intended to make a bill of sale, and to pass thereby the title to property, the law will, if possible, so construe the words used as to effectuate that intent. On looking at this paper, there can be no doubt that Hudson intended to make a bill of sale which would pass whatever title to the mining claim described, still remained in him.

One of the points named in the description is in El Dorado county, and all of them, so far as we can see, may be well known monuments, easily found and distinguished.

If it was true that Hudson was giving away his mining claim, that fact furnished no ground for refusing to admit the bill of sale in evidence. He had the full right, so far as the court could know at that stage of the case, to give it away, or do what he pleased with it.

To establish their title, the defendants proved that in November, 1868, Hudson made a mortgage upon the Willow Bar claim to secure a debt then owing by him; that on the 18th of April, 1869, he died, leaving a will, in which he directed his executors to sell all of his property and pay his debts; that the debt secured by mortgage was in due time presented to and allowed by the executors and the probate judge, and thereafter, upon an order of the Probate Court, the mortgaged property, in-

cluding the property in dispute, was sold, and the proceeds of the sale applied to the payment of the mortgage debt, and that the defendants hold under the purchasers at this sale.

It is claimed for the defendants that the order of sale made by the Probate Court was, in effect, a foreclosure of the mortgage, and that the purchasers thereunder took, by relation, the title which Hudson had at the date of the mortgage.

This position can not be maintained. The Probate Court is not a court of equity, and it has no power to foreclose a mortgage. Sales made under its orders pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired.

At the conclusion of the testimony, the defendants requested the court to instruct the jury as follows:

"If the jury find that Hudson died in debt, and that before his death he gave away the ground in dispute to Myers by the paper offered in evidence, and received no consideration therefor, and should find that Hudson's property would not pay his debts without a sale of the ground in dispute, and that the ground in dispute was sold by Hudson's executors, of necessity, to pay the debts, then the sale by the executors carried the title, and Myers' paper did not give him any title. If the jury find that at the time this suit was commenced, the defendants were in the exclusive and peaceable possession of the ground in dispute, and had been in such exclusive and peaceable possession for more than one month before that time, then this possession of the defendants precludes the plaintiff from bringing this form of action, and the jury must find for the defendants on the question of damages."

The court refused to instruct as requested, and the refusal is assigned as error.

We see no error in the action of the court in this respect. If the hypothetical facts stated in the first instruction—of which there is no evidence on the record—existed, they furnished ground for setting aside, in behalf of creditors, the conveyance to the plaintiff; but they furnish no ground for the defendants, who are not creditors, nor in the place of creditors, to assail his title.

The second instruction was properly refused, because, if

the plaintiff owned the ground in dispute, the first entry upon it by the defendants was unquestionably a trespass, for which an action would lie. The objection that if the defendants had remained in possession for a month or more after their first entry, the action must wholly fail, can not, therefore, be maintained.

The other points made do not require special notice.

Judgment affirmed.

Mr. Chief Justice WALLACE did not express an opinion.

McBEE v. LOFTIS AND HAMPTON.

(1 Strob. Eq. 90. Court of Appeals of South Carolina, 1846.)

Use, distinguished from land. An instrument of writing not intended to grant the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of land within the Act of 1795, requiring two witnesses.

Option to abandon. Such instrument construed to allow a privilege of surrender at the end of a year, but not to be of such character that a surrender at such time could be compelled.

"Work free of expense." The power to "work free of expense" entitles the party to work in any manner he thinks proper by himself his servants, agents or assignees.

The statute of limitation and the rules as to presumptions from lapse of time are founded on the same principle, and neither can attach until there is some wrong done, or right withheld, because until then the party injured had no cause of complaint and no right to sue.

Innocent purchaser. The plea of purchaser for valuable consideration, without notice, must aver the consideration and actual payment of it, which payment must be proved—the averment of a consideration secured is not sufficient.

Deed—Non-user. The right of mining can only be acquired by deed and is not forfeited by non-user of less than twenty years.

The cause below was heard before JOHNSON, CH., at Greenville, June, 1845.

The case is embodied in the following circuit decree:

JOHNSON, CH.

Lemuel Loftis, the father of the defendant, Andrew Loftis,

being, as it is admitted, seized in fee of the tract of land described in the pleadings, on the 23d of November, 1830, entered into a penal bond, conditioned to convey the said land to John Mosteller and Jesse Green. It seems to be conceded, too, that one J. H. Randolph by some means acquired the interest which Mosteller and Green took in the land under the said bond, but at what time does not appear; and on 13th June, 1834, the said J. H. Randolph and Lemuel Loftis entered into a mutual agreement, by which the said Loftis agreed to *buy* of the said Randolph the said tract of land, on certain terms therein specified; and it is therein, amongst other things, provided that "the said Randolph, on his part, retains this privilege of working the land the present year for a crop —the mine part, of gold, till he is satisfied; which, should he find not worth working, he will give up said claim the present year; but if it will do, he is to work it free of expense, having any necessary use of water and timber to do so." "The said Randolph must have house room," etc. On the — day of August, 1835, the said Randolph, in consideration of one hundred dollars, conveyed to the complainant, by deed, all the mining privileges, with the use of water and timber, reserved to him in his agreement with the said Lemuel Loftis, before set forth; and this constitutes the complainant's claim to the relief prayed for in the bill. But on the 26th of February, 1836, Lemuel Loftis gave and conveyed the land to defendant, Andrew Loftis, by deed, without reserving any of the rights or privileges recorded in his agreement with the said J. H. Randolph, and on the 21st of December, 1844, the said Andrew Loftis, by deed, conveyed the land to his co-defendant, J. W. Hampton, in fee, without condition or reservation.

The bill charges that the defendant Hampton had, for some months before the filing of the bill, been mining for gold on the land, with a large number of hands, etc.; prays an injunction to restrain him from further mining and for a discovery of the amount of gold found and collected.

The defendants have both answered, and neither of them controverted the facts before stated. The defense relied on in the answer of the defendant, Andrew Loftis, is, 1st. That the complainant's claim is barred by the statute of limitations. 2nd. That the reservation in the agreement between Lemuel

Loftis and J. H. Randolph, conferred on the latter only the right of mining for one year.

3d. That complainant's long acquiescence in the rights of this defendant, and permitting him to sell the land and warrant it, operated as a forfeiture of any interest he had. The same grounds are relied on in the answer of the defendant Hampton; and on the argument it was further insisted, 1st. That the rights of J. H. Randolph, under his agreement, were personal, and not assignable. 2d. That that agreement was void, as there was only one interest to it. 3d. That the legal estate being in defendant, Andrew Loftis, and Hampton having purchased for valuable consideration, without notice of complainant's claim, will be protected. 4th. That complainant's rights are forfeited by non-user.

It appears from the evidence, that Isaac Randolph, the brother of J. H. Randolph, worked the mine a few months in the latter part of the year 1834, or the beginning of 1835, with his consent or under his authority; and that in one of those years, the complainant, with a view to test the propriety of purchasing Randolph's interest, worked the mine for a short period. Lemuel Loftis lived within a mile and a half of the place, and was occasionally at the mine during the time, and made no objection to it. The defendant Andrew Loftis, lived with him at the time. On the 14th August, 1835, J. H. Randolph gave written notice to Lemuel Loftis, that he had tried the mine, and found it worth working, and therefore intended to work it, or have it done. Although he was not able to resume the work when his brother worked it, he should have it worked, or sell the privilege to some one else. In 1838, the complainant with some hands, worked at the mine for six or seven weeks, and was obliged to discontinue on account of the scarcity of water. Defendant Andrew Loftis was frequently there during the time, and put complainant's agents in possession of one of the houses. He made no objection to the working, but said he expected complainant had or would give him up the land to plant corn on. The defendant, J. W. Hampton, commenced to work the mine last spring. The defense, although thus diversified in the pleadings and the argument, may be resolved by a few general propositions, which strike me as of easy solution. They

refer, 1st. To the form and legal effect of the agreement between Lemuel Loftis and J. H. Randolph of the 13th June, 1834.

The objection as to the form applies exclusively to its not having more than one witness. I have not been able to appreciate the force of this objection. The statute of frauds only requires that contracts concerning lands should be in writing, and signed by the party to be charged. I suppose it has its foundation in the requisitions of the Act of 1795, which prescribes the form of deeds for lands, which are intended to convey the fee, and provides that they shall have two subscribing witnesses. Regarding it as a grant from Lemuel Loftis, of the rights which are in terms, and, as I think, in legal effect, reserved to Randolph, it does not, and was not intended to, grant the soil in fee, but the use, for the purpose of mining for gold, and it is not a deed for the conveyance of land, within the Act of 1795.

But on referring to the contract, which is sealed by the parties, it will be found that it assumes that the fee was in Randolph. It begins thus: "This instrument witnesseth that Lemuel Loftis, of one part, *buys* of J. H. Randolph a certain tract of land adjoining him, for which he pays in the following way": "And the said J. H. Randolph, on his part, retains the privilege of working the land the present year, for a crop—the mine part of gold, till he is satisfied; which, should he find not worth working, he will give up said claim the present year; but if it will do, he is to work it free of expense, having any necessary use of water and timber"; and it is not, therefore, a contract by which Lemuel Loftis grants to Randolph the privileges of mining, but by which he *buys the land*, the fee of Randolph—a concession that the fee was in Randolph; and having been made with a full knowledge of all the circumstances, Lemuel Loftis would, at law, be concluded, and I think in this court also. He was bound by his bond to make titles to Randolph, and, for the purpose of attaining justice, this court will presume, in many cases, that done which the party ought to have done.

Under this head, the inquiry arises whether the right of Randolph to mine for gold was, by the terms of the contract, limited to a year or not, and whether the contract is regarded

as a grant or a reservation of the right is immaterial to this question, as in either case it must receive the same interpretation. That it was not intended to be limited to a year, is too plain to admit of any doubt. The agreement expressly promises that Randolph should retain the privilege of working "the mine part of gold till he is satisfied, which should he not find worth working, he will give up said claim the present year; but if it will do, he is to work it free of expense, having any necessary use of water and timber," etc., indicating, as clear as language can do, the intention that Randolph should have the year to test the value of the mines, and that if, in his judgment, it was not found worth working, he would "give *it up*," (surrender it) to Lemuel Loftis; and if, in his judgment, he found "*it will do*," (be worth working) he should be at liberty to work it free of expense, without limitation of time. Now, his election to continue to work the mine, was not, by the terms of the contract, to be indicated by any act or declaration on his part, but his intention not to do it, was to be indicated by his giving up (surrendering it) to Lemuel Loftis.

I do not understand it, however, as requiring a formal surrender or positive declaration that he would no longer work the mine. Any act indicating his intention to do so, would be sufficient—as, if he had abandoned it without intending to return to it; but there is no evidence of any act or declaration on the part of Randolph, indicating an intention to abandon the mine. He worked it for several months in the latter part of 1834, or the beginning of 1835, through the agency of his brother, Isaac Randolph, and in August, 1835, he gave Lemuel Loftis explicit notice that he did not intend to abandon it, and again the complainant worked in 1838 for six or seven weeks under the authority of Randolph. Both Lemuel Loftis and the defendant, Andrew Loftis, knew that he had not abandoned his rights, and that they conceded his privilege to exercise them, is clear, from the fact that they knew that he exercised them, and opposed no objection to it. Under this general head, falls also the inquiry whether the rights and privileges of Randolph were assignable.

It is too plain to admit of a doubt, that the right of mining is a subject of grant, and may be transferred or assigned.

It is said to be a right which lies in grant, and can not be transferred without deed. See Black. Com. 22, No. 1, Chrest. ed. And I do not understand that this defense is put upon that ground, but that by the terms of the agreement between Randolph and Lemuel Loftis, the right to mine is restricted to Randolph personally. The terms used are, "he is to work free of expense," etc., and I apprehend where, as in this case, the right of the whole, and the enjoyment, are unrestricted by the terms of the grant, or more appropriately, by the reservation, the grantee may use the thing in any manner he thinks fit, either by himself, his servants, agents, or assignees. A tenant of the freehold may underlet one entitled to all the wood growing on a defined piece of ground; may transfer that right to another; because the exercise of it by another does no wrong to the owner of the soil—and so of the right of mining.

The second general proposition which arises out of the case is as to the effect of time, as applicable to the statute of limitations, and the lapse of time upon the right of the complainant. The statute furnishes an arbitrary but wise rule, and was intended to protect persons in possession of property against claims, the evidence against which may be supposed to have been lost or destroyed. The rules as to presumptions from lapse of time are founded on the same principle, and it follows, necessarily, that neither can attach until there is some wrong done or right withheld; because until then the party injured had no cause of complaint, and no right to sue. If, for example, one having title to land, thought proper to leave the possession vacant for an hundred years, and no one entered, and a stranger then entered, could he avail himself of the time past as a protection under the statute, or lapse of time? Now, there is no evidence at all that there has been any act done by either of the defendants or Lemuel Loftis, under whom they claim, inconsistent with the right of the complainant, until the spring of this present year, a few months before the filing of the bill, when the defendant, Hampton, commenced working the mine, and no one will insist that in that time either the statute or the presumption would operate as a bar.

The defendant, J. W. Hampton, states in his answer, that

he purchased of the defendant, Andrew Loftis, "having no notice whatever of complainant's claim, or any incumbrance, until about the last of March or first of April, 1845," and he insists "that the long acquiescence of complainant in the right of Andrew Loftis, and his sale and conveyance" to himself, may operate as a bar to the complainant's claim—and upon this rests the defense of purchaser for valuable consideration, without notice.

Without adverting to the informality of these averments, whether regarded as a plea, or as the substance of a plea, embodied in the answer, it wants one essential ingredient, to wit, the averment that the defendant had paid the purchase money, which he was bound to prove. In Mitford's Pleadings, 216, it is said, amongst other things, that the plea of purchase for valuable consideration, without notice, must aver the consideration and actual payment of it. The averment of a consideration secured to be paid, is not sufficient, and in this all the authorities concur. See 3 Atk. 304, 814. Here there is no such allegation or proof.

The only remaining question is, whether the complainant's right has not been forfeited by non-user. The general rule is that rights may be surrendered or lost by the same means by which they were acquired. We have before seen that the right of mining can only be acquired by deed, and we need not travel out of the numerous cases decided in our own courts for the rule that a grant of the freehold will be presumed from twenty years' continuous possession, and not sooner, and the same rule is applicable to the right of mining. It is familiarly applied to the right of way and other easements.

It is ordered and decreed that a writ of injunction do issue, perpetually to restrain the defendants from mining for gold on the lands described in the pleadings, and that they do account before the commissioner of the court for the gold collected by them on the premises since they have had the possession thereof, and it is further ordered that the complainant has leave to move such further orders as may be necessary to carry this decree into effect.

The defendants moved to reverse the decree on all the grounds of exception taken in the answers and in argument on circuit, and, further, that the decree, on the proofs made, is contrary to law and equity.

HENRY, for the motion.

PERRY, *contra.*

PER CURIAM. The court is satisfied with the reasoning of the decree, and the same is affirmed.

Decree affirmed.

HARTWELL v. CAMMAN ET AL.

(10 New Jersey Eq. 128. Court of Chancery, 1854.)

Severance. A deed may convey a distinct inheritance in mines, the fee to the land remaining in the grantor. When not severed from the general title they pass with the soil without being expressly mentioned in the deed.

Construction—Unknown mines—Paint stone. By a conveyance of "mines and minerals," the grant does not convey everything in the mineral as distinguished from the animal kingdom; but the expression can not be restricted to "metalliferous ores"; and it includes mineral deposits in strata or beds as well as veins. In this case it was *held* to include a deposit of "paint stone" found on the premises.

[1] **Parol evidence—Known minerals.** Parol evidence is not admissible to show that when a deed was made conveying "all mines and minerals," copper ore alone was contemplated by the parties, or known to exist on the land, so as to restrict the operation of the words of the grant. Parol testimony may be received to explain the technical meaning of such words as "mines" and "minerals," but not to show that the parties to the deed gave any peculiar or restricted meaning to such words.

The bill alleges that one Thomas A. Hartwell did, by deed dated on the 2d of February, 1846, convey to Albert Camman certain mining rights and interest in certain premises in said deeds described, and that T. A. H. on the 23d of June, 1847, by deed of that date, did sell and convey to the complainant, and to his heirs and assigns forever, the same tract of land with warranty, excepting out of the same the right of mining so conveyed to said A. C.; that previous to this conveyance, there had been many experiments made for copper ore, supposed to abound in the premises; that shafts had been sunk and worked for copper ore within a few hundred yards,

[1] *Caldwell* v. *Fulton*, 3 M. R. 237.

and that no other mineral had been sought for on the said premises; that the said conveyance from T. A. H. to A. C. was made in contemplation of, and with reference to the character of the range of hills as a deposit of copper ore; that in the latter part of the year 1850, the said A. C. discovered upon the surface, and just below it, a hard substance like red shale; that he had it analyzed, and in December, 1851, commenced digging and excavating said substance and grinding the same into paint and disposing of the same; that said C. procured the stock of a company called the South Branch Mining Company, and, on the 17th of September, 1851, conveyed to the said company all his mining rights in the premises aforesaid and afterward obtained from the legislature a change of the name of the said company to that of "The President and Directors of the Bridgewater Paint Manufacturing Company"; that the said company have dug out, and ground into paint, and sold large quantities of the same, and threaten to continue said operations. The prayer is that the said defendants may be restrained by injunction from digging and removing from off the said premises the said stone from which paint is manufactured, or for any other purpose save in such inconsiderable quantities as might be necessary and incidental to ordinary mining for ores and minerals, usually and properly so called; and that they may be restrained from disfiguring and destroying the surface of the said premises to any greater extent than would be proper and necessary in mining for such minerals and ores.

To this bill the defendants filed a joint and several answer. The principal allegations of the bill are admitted, except that Camman denies that, at the time of his purchase he had in contemplation copper ore only, or any particular mineral. And the answer insists that this paint stone is a mineral within the meaning of the term, as it is used in the deed. The answer further alleges that the excavation of this material has been carried on with the consent of the complainant; that he aided in the organization of the company, and became an original stockholder to the amount of fifty shares, which stock he still retains.

On filing the bill, a temporary injunction was granted by

the master, which was dissolved upon the coming in of the answer on motion.

Both parties having taken their proof, the cause came up for final hearing.

GASTON and W. L. DAYTON, for complainant.

G. H. BROWN and J. S. NEVIUS, for defendants.

THE CHANCELLOR.

As to the construction of the deed from Thomas A. Hartwell to Alfred Camman in reference to the interest which passed to the grantee, I have no doubt it was intended to convey to Camman an estate of inheritance in the mines. The words used are appropriate to the conveyance of such an estate, and such is the legal construction to be put upon the instrument. Such an estate in Camman is not inconsistent with the general title to the lands in which the mines are situated remaining in Hartwell, the grantor. The mines may form a distinct possession or inheritance from the lands. They are capable of livery, and of being made the subject of ejectment: *Comyn* v. *Kyneto*, Cro. Jac. 150; *Barnes* v. *Mawson*, 1 Maule and Sel. 77. When not thus severed from the general title of the lands in which they are situate, they are part of the lands or demesnes themselves, and will pass with the lands without being expressly mentioned in the conveyance. The deed under consideration is in the usual form of a deed of bargain and sale. In the *premises* of the deed, the language of the grant, and description of the thing granted is, "doth give, grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, the right, title and interest, in and to all mines and minerals, opened or to be opened, with free ingress and egress to the same for the purpose of mining in all its various branches, of, in and to the following described tract of land," etc. The language of the *habendum* and *tenendum* is as follows: "To have and to hold all and singular the interests, right and privilege of mining in and to the said lands and premises unto him the said Albert Camman, his heirs and assigns forever." Then the covenants that the grantor is the rightful owner; that the premises are unincumbered; that the grantor hath full power to grant, and

that he will warrant and defend. Then follows this explanation or qualification: "This agreement and this conveyance is upon this condition, that the said second party is not to have any right or privilege to said premises other than for general mining purposes; that neither said second party, his heirs or assigns, shall cut, damage or destroy any wood or timber on said premises, except it shall be actually necessary so to do for mining purposes, and in that case to pay a reasonable compensation to the said party of the first part, his heirs and assigns for the same." This condition, as it is called, neither contradicts nor is it repugnant to the estate before granted. The estate was clearly one of fee simple in the mine. The condition neither lessened, enlarged or qualified that estate. It was nothing more than a further expression of the intention of the parties, that nothing was intended to pass by the deed, except the "mines and minerals," and that the general title to the land remained in the grantor.

Albert Camman subsequently conveyed the estate which he took in the mines and minerals to the defendants, "The President and Directors of the Bridgewater Paint Manufacturing Company," and they are now entitled to the enjoyment and to all the benefits of that estate.

If such be the correct construction of the deed, then the position taken by the defendants' counsel, that Thomas A. Hartwell retained no further or other interest in the land except that reserved to him as to the wood and timber, and that he, or his assignee, had no right to carry away from off the land, for his own benefit, this substance which has given rise to this controversy, even if it is not embraced in what was conveyed to Camman, can not be maintained. Camman took the estate in all the mines and minerals, and has a right to the possession of them and to their enjoyment, and to anything necessary and incidental to that enjoyment. The title to the lands where those "mines and minerals" are found remained in Hartwell, and he and his assignee are entitled to the enjoyment of everything else appertaining to those lands except the "mines and minerals." If the material, then, which the defendants are carrying away and converting to their own use, is a "mineral" which passed by the deed, the complainant can not interfere with the right of ownership

which the defendants are exercising. If it is not a "mineral" in the sense intended by the parties, then the complainant has rightfully invoked the aid of this court, and he himself is entitled to the enjoyment of the material, and may enter upon the land, and collect and convert the material in it to his own exclusive use.

Did this material pass with the estate conveyed to Camman? If it is embraced within the terms "mines and minerals" it did, otherwise it did not.

I admit that I have experienced very great embarrassment in giving an answer to this question satisfactory to myself. Perplexed with doubts, I found I could only extricate myself from difficulty by making most of the maxim, "The words of an instrument shall be taken most strongly against the party employing them." Co. Lit. 36 a.

By the use of the terms "mines and minerals," it is clear the grantor did not intend to include everything embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdoms. If he did, he parted with the soil itself. Such a construction would be inconsistent with and repugnant to the whole tenor of the grant. Nor can I see any more propriety in confining the meaning of the terms used to any one of the subordinate divisions into which the mineral kingdom has been subdivided by chemists, either earthy, metallic, saline or bituminous minerals. By his bill, the complainant endeavors to confine the terms to a more restricted sense, or definition, than either one of these subordinates; for he claims a construction should be put upon the words, by the aid of circumstances surrounding the parties, and relating to the subject-matter of the grant at the time the grant was made; and by a construction thus derived, he confines the terms not to the metallic ores, but, more limited still, to copper ore alone.

As to the extent to which parol testimony is admissible in giving an interpretation, or proper definition, to the words used here, I have no difficulty. Where a term of art is employed, or a word connected with some department of the natural world, which has become technical and popular in its use among scientific men and men of letters, a court, when called upon to give a construction to such words may avail itself of

parol testimony to ascertain the technical and popular use of the word. But parol testimony is not admissible, under any circumstances, to show that the parties to an instrument of writing under seal, placed upon a particular word or phraseology, which controls the whole effect and value of the writing, any limited or definite meaning for the purposes of that particular instrument. Where the construction depends upon the definition to be given to any particular words, and there is an ambiguity created from the manner of their use, and in such use the words can not be said to have any popular or technical scientific meaning, or the learned differ as to such meaning, then the only resource left is to adopt the next most comprehensive meaning not excluded by the expressed or plain intention of the parties. This is a salutary mode of construction, for, as Mr. J. Blackstone remarks, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words, and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterward at liberty to put their own construction upon them: 2 Bla. Com. 380.

No extrinsic evidence is admissible for the purpose of showing that the grantor intended to confine the words "mines and minerals" to copper ore only. If the grantor can do this, then it follows he may, by parol evidence, show that the parties fixed an arbitrary meaning to words upon which the whole efficacy of the deed depends, contrary to their natural and ordinary import and popular acceptation. But the complainant may introduce parol evidence to show the scientific and popular meaning of the words "mines and minerals" under an exception to the general rule. Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *de hors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party: Broom's Legal Maxims, 266.

In this case parol evidence is admissible *ex necessitate*. The

ambiguity is created by extrinsic evidence, and it may be removed in the same manner. The allegation is that the defendants are removing from the complainant's soil a particular substance or material. The answer is, that the defendants have a right to remove it because it was conveyed to them under the terms "mines and minerals." The complainant rejoins that those terms did not include the substance in question. The parties must therefore give evidence as to the character of the material and they may show that it is or is not embraced in the scientific and popular use of the terms employed by the grantor.

The character of the substance or stone paint, as the witnesses call it, is given in the bill, and the correctness of the description there given is admitted by the answer, and confirmed by the evidence. It is a substance resembling in general appearance red shale, so soft as to be easily cut with a knife when first excavated, but differing in appearance and quality from the surrounding earth. It is found in irregular *strata* or *boulders* of various sizes. It hardens when exposed to the air, and when broken up and ground it is used as a paint, and is valuable for that purpose. The manner in which it is procured from the earth, and its particular location below the surface, are particularly described by a witness, who was the foreman in carrying on the works. They commenced working in an old shaft, which had been used for raising copper ore. As they proceeded with the excavation the dip of the paint stone was about one foot in eight or ten, perhaps a little more. At the point of the pit, opposite to the side at which the excavation was commenced, the paint stone was from eighteen to twenty feet from the surface of the earth. The work was carried on by making regular mine shafts of timber, one of which was extended about fifty-six feet in length, and penetrated about twelve feet in the mountain beyond the open pit. Other pits were made very similar in character. The *stratum* of the paint stone in the largest pit was found to vary from six to fifteen feet in thickness. The *stratum* was uniform, increasing in thickness as progress was made into the mountain. It does not crumble like red shale, but goes off in square pieces. It is ground in

a mill, and is then fit for use, as a paint, by mixing it with oil. Its value is from twenty to thirty dollars per ton.

Professor Doremus is the only scientific witness examined. He says, "it may be called an argillaceous sandstone, alumina and silica being the prominent ingredients; it is not an ore of iron. This comes under the head of argillaceous rocks. I wish to distinguish these classes from ores or metalliferous rocks. The position of this paint material as it lies in the mountain, is not in veins but in strata. The extracting of this material, as I saw it there, would not be called mining."

I think I have extracted all the facts from the whole case which can shed any light upon the investigation. The analysis only establishes the fact, that this is not a metalliferous ore. If the terms "mines and minerals," used in the deed could by any fair construction, be confined to metallic substances, the question involved would be of easy solution; for the metallic property found in this paint stone is so small, that for the purpose of extracting the metal it is of no value. But I do not think the terms should be confined to the metals or to metallic ores. I can not doubt, if a stratum of salt, or even a bed of coal, had been found, they would have passed under this grant.

Can this stone paint, then, be fairly and naturally embraced in the term "mineral"? It is a body which is destitute of organization, and which naturally exists within the earth. It is below the surface, distinct from the ordinary earth. It is in *strata* and is worked by the ordinary means of mining. And although Professor Doremus says it is not in *veins* but in *strata*, and that he would not call the mode of extracting it mining, yet this test of his would exclude salt from the class of minerals; for salt, too, is found in *strata* and not in *veins*, and is obtained by shafts and by the same mode of operation by which this material is extracted from the earth. It is valuable for its mineral properties, and, by a cheap and easy process of grinding, is converted into a merchantable article adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term "mineral." In Bakewell's Mineralogy, page 7, it is said, "the term mineral, in common life, is generally applied to denote substances dug out of the earth or obtained from

mines." In Cleveland's Mineralogy, page 1, the definition is given thus: "Minerals are those bodies which are destitute of organization, and which naturally exist within the earth or at its surface." My conclusion is, that this paint stone passed by the grant, and that the defendants have a right to excavate and remove it, and to convert it to their own use.

The position which the complainant occupies in this cause before the court, is one which entitles him to nothing more than strict right. The defendants, "The President and Directors of the Bridgewater Paint Manufacturing Company," were organized for the very purpose of procuring this paint stone from the premises, and preparing it for market. Camman conveyed to them, for these purposes, the estate which had been granted to him by Thomas A. Hartwell. The general title to the land had been conveyed by Thomas A. Hartwell to the complainant, Samuel Swan Hartwell. The complainant became an original stockholder, to the amount of fifty shares, in the company, and still continues to hold those shares. At the commencement of the undertaking, it was a matter of doubtful experiment whether this paint stone could be made a valuable article of merchandise. While a matter of uncertainty, this complainant was a partner, contributing himself, and in encouraging others to contribute, to do that which he now complains is an invasion of his freehold. He gave a construction to the grant by his own acts, and encouraged others to expend their money to make this property valuable.

There is another ground upon which the complainant asks the interference of the court on his behalf. He complains that the defendants are disfiguring, removing, and destroying the surface of the premises to a greater extent than is necessary for proper and ordinary mining purposes. The evidence does not sustain the allegation. Only one third of an acre of the surface of the ground has been removed. The value of the land damaged is about eighty-three cents and that of the wood about three dollars.

The bill must be dismissed with costs.

CALDWELL v. FULTON.

(31 Pennsylvania State, 475. Supreme Court, 1858.)

Severance by deed. The minerals beneath the surface of land may be conveyed by deed, distinct from the right to the surface.

Minerals pass by deed. Minerals are a corporeal hereditament, and pass by apt words in a deed, though not susceptible of livery of seizin.

Deed construed to be a conveyance—not a license. A conveyance of a tract of land with "the full right, title and privilege of digging and taking away stone-coal to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is not a license but a conveyance of entire ownership of the coal in place, beneath the adjoining tract.

[1] **Parol evidence to explain deed.** The nature and quantity of the interest conveyed by deed, is always to be ascertained from the instrument itself; and is not open to explanation by parol evidence.

Incorporeal right indivisible. An incorporeal right is indivisible, and if the grantee divide it by his own act it is extinguished.

Error to the Common Pleas of Westmoreland County.

This was an action on the case by W. S. Caldwell against Robert Fulton, for digging and taking 20,000 bushels of stone-coal from under his lands.

On the 27th of May, 1831, James Caldwell, the ancestor of the plaintiff, was the owner of the *locus in quo*, and on that day he conveyed to one George Greer sixteen acres of the tract, lying on the Youghiogheny river; and "also, the full right, title, and privilege of digging and taking away stone coal, to any extent the said George Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said James Caldwell; provided nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises."

On the 23d of March, 1842, George Greer conveyed an undivided moiety of the said tract of land, and one half of the coal, to Butler Case; who on the 20th January, 1844, conveyed his interest to William McCune.

The other undivided moiety, by sundry conveyances, became vested in Thompson Bell; and on the 7th June, 1848, Bell and McCune made partition by deed.

[1] *Hartwell* v. *Camman*, 3 M. R. 229.

The defendant, under a lease from McCune, entered and dug the coal in question; and to recover damages for the taking of it, this suit was brought by the plaintiff, who claimed by devise from his father, James Caldwell.

A former suit for the same cause was before this court in 1855, on which occasion the following opinion was delivered by

WOODWARD, J.

This was an action of trespass for taking coals from the land of the plaintiff. He claimed the *locus in quo* by devise from his father, James Caldwell. The defendants justified under George Greer, to whom James Caldwell made a deed, in his lifetime, for the coals taken, and as the judgment to be entered in this case must depend on the construction of that deed, it is important to obtain, at the threshold, a clear and comprehensive view of the terms.

The deed was dated on the 27th May, 1831; acknowledges a consideration of one thousand eight hundred dollars; is to George Greer, his heirs and assigns, for all the therein "described property, situate on the east side of the Youghiogheny river"; and then describes, by metes and bounds, two parcels of land, one of which contains six acres and forty-seven perches, the other, ten acres and fifty perches. The grant of coal then follows in these terms: "Also the full right, title and privilege of digging and taking away stone coal, to any extent the said George Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said James Caldwell; provided, nevertheless, the entrance thereto and the discharge therefrom be on the foregoing described premises." In the *habendum* the property conveyed is called two lots or parcels of land, and the "aforesaid right to the stone coal," and is so designated again in the covenant of warranty. Such was the original grant.

On the 23d of March, 1842, Greer and wife conveyed an undivided half of the premises to Butler Case, and the other half to John B. McCune. January 20, 1844, Butler Case conveyed to William McCune. December 5, 1844, John B. McCune conveyed his moiety to Thompson Bell. By deeds bearing date the 7th June and the 30th August, 1848, Bell and William McCune made partition between themselves

of the sixteen acres, according to agreed lines, and of the coal lying back of said lots, under the Caldwell farm, in a manner corresponding with the partition of the lots.

In August, 1852, William McCune leased to Fulton and the other defendants his several part, both of the lots and the coal; and it was the entry upon the coal under this lease, for which the suit was brought. It does not appear from the record whether any opening had been made into the coal, on the part of the premises set off to McCune, but it is stated that the opening on Bell's portion of the ten acre piece has not been worked since Fulton commenced working the coal on McCune's part.

The court below seems to have been at a loss whether to denominate the grant of coal in Caldwell's deed to Greer a common in gross, or appurtenant, or a license, but were clear that it was not an absolute grant of all the coal under the plaintiff's land.

A license it can not be. The form of the conveyance excludes that. License is defined to be a power or authority given to a man to do some lawful act, and is a personal liberty to the party to whom given, which can not be transferred over, but it may be made to a man or his assigns: Tomlin's Law Dic. Because a mere license to enjoy a privilege in land is not an estate therein; it may be granted without deed and even without writing, notwithstanding the statute of frauds. But here an estate or interest was evidently intended to be conveyed, and it must have been either a corporeal or incorporeal hereditament. Whether the one or the other, it was assignable by the very terms of the grant; but if incorporeal, I agree it was not divisible. Bell and McCune were capable of taking, as assignees of the original grantee, but they were bound to hold, enjoy and convey the hereditaments as an entirety, and when, by mutual conveyances, they parted it into severalty, and extinguished thus each his moiety, they could no longer hold by entirety, and therefore could not hold at all. Lord Mountjoy's case, which has often been recognized as good authority, contains all the principles necessary for the decision of the case, if the thing granted be regarded as an incorporeal interest. That case, as reported in *Godbolt*, was thus: Lord Mountjoy by deed sold and conveyed the manor

of Camford to Brown, in fee, with a proviso in the indenture that contained Brown's covenant "that Mountjoy, his heirs and assigns, may dig for ore within the land in Camford, which is a great waste, and also to dig for turf there, to make alum and copperas, without any contradiction of the said Brown, his heirs and assigns."

Three things were resolved:—

First. That Lord Mountjoy could not divide the said interest so as to grant the one to dig in one parcel of said waste, and to another to dig in another parcel thereof.

Second. That notwithstanding the proviso, Brown, his heirs and assigns, owners of the soil, might dig there also; like to the case of common *sans nombre.*

Third. That Lord Mountjoy might assign his interest, but if there were several assignees, they could not work severally, but must work together, with one stock, else there would be a surcharge to the tenant of the soil.

The reservation in that case was very indefinite, "to dig for ore and turf, in a great waste, to make alum and copperas." There could be no livery, no corporeal tradition of the thing granted, and if the terms of Greer's deed impart no more than is contained in Mountjoy's reservation, Bell and McCune could work with only one stock, and might not surcharge the owner of the surface by introducing an indefinite number of distinct operations.

But was this the grant of no more than an incorporeal hereditament? Caldwell reserved no interest himself. He sold, for a valuable consideration, all he had in the sixteen acres, and all the coal in the other land. I say all, because the grant is limited to no time, or quantity, or purpose, or person. The full right to take stone coal to any extent the grantee, his heirs, or assigns, may think proper to do, or cause to be done, are not, perhaps the best chosen words for describing the *corpus:* but what less than the whole of the coal can they be construed to mean? If not the whole, how much coal is granted? Can a reservation to the grantor be implied, in the face of terms so large? That were to reverse the maxim that deeds are to be taken most strongly against the grantor. The will of the grantee was the measure of the grant. Not only he, his heirs and assigns, were to take *ad libitum*, but

might cause to be taken, without stint. The grantee might plant a miner on every available foot of the coal, under that deed. There was only one condition, that the entrance to the coal, and the discharge therefrom, should be on the sixteen acres, and because this was expressed no other was intended. *Expressio unius exclusio alterius.* Subject to that condition alone, the grantee was invested with complete dominion over the coal. What room was left for the grantor? Might he too mine coal? Assuredly not, against the consent of his alienee, for he had sold all the coal that alienee might think proper to take or cause to be taken. And if the grantor might not mine of right, then the grant was total; he might not take a part because he had conveyed the whole. There are many untechnical words, which, receiving an interpretation according to substance, are held to vest effectual estate. Thus a grant of the profits, or income or rent and issues, or acceptation and profit, or free use, or the right to dispose of, or to give or sell, or to dispose of at will or pleasure, or to do his will therewith, or to be at his discretion, or to be freely enjoyed, are sufficient to pass the title out of which such rights are to flow, or over which such powers are given, where no evidence of a contrary intention is furnished by the instrument itself: 1 Salk. 228: 5 Mod. 63, 98, 101; Cro. Eliz. 190; Cro. Jac. 104; Plowd. 541; Viner Abr. (Devise H.); 9 Mass. R. 372. It was in relation to such grants that GIBSON, C. J., said, in *Morris* v. *Phaler*, 1 Watts, 390, "it is an undoubted rule, that the bequest of a general power of disposal carries the absolute property, whenever a limited interest is not given. For such a power, being a principal attribute of ownership, necessarily implies the existence of it, whenever the implication is not rebutted by the bequest of a special interest inconsistent with it."

These are principles in the construction of wills, but equally applicable to deeds, except in those instances where inflexible rules of law demand certain words of perpetuity, to create more than estates for life. For these reasons drawn both from an analysis of the deed itself, and from the principles of interpretation, as applied to written instruments, we conclude that Caldwell sold and conveyed to Greer the absolute and exclusive right to all the coal under his land; and from

this it must necessarily follow, it was a corporeal, and not an incorporeal interest. An exclusive right to all the coal to be taken, without limitation, except as to the point of ingress and egress, is a sale of the coal itself; and there is nothing incorporeal about coal. It is included in the definition of land, and those hereditaments only are incorporeal which are not land. Rent is the best definition of an incorporeal hereditament; it issues out of the thing corporate, but is not part of it. The thing is as perfect after render of the rent, as before. So common of pasture is a right issuing from land, without diminution of the source; common of estovers, of turbary and of coals, are not, strictly speaking, incorporeal, for they are not so much the produce of lands annually renewable, as they are part of the land itself. But these are always appendant or appurtenant to a particular tenement, and, as a classification, can not comprehend coal mines which are worked for purposes of trade and profit. And to none of these distinctions in the law of common can this grant be referred, if we are right in holding it to be exclusive in the grantee and his assigns. It is their close, as much as if it were land. This point was ruled in *Wilson* v. *Mackreth*, 3 Burr. 1825. The action there was trespass for entering plaintiff's close, and digging and carrying away turf and peat. The objection was, that the remedy should have been case, as the plaintiff did not own the soil. But all the judges held the action would lie, because the plaintiff had an exclusive right to the turf and peat.

Can it be doubted that these defendants might maintain trespass and ejectment against intruders into their mines? It has been often ruled in England, that trespass and ejectment will lie in respect to open coal mines, for of these there can be possession; but mines not opened, when held by another than the owner of the soil, are sometimes said to be incorporeal, because they lie in grant and are not susceptible of livery of seizin. With us, delivery and registration of the deed stand in lieu of livery, and there is no ground or reason for maintaining an embarrassing distinction in respect to this very important kind of property.

It is a common thing, in the mineral districts of Pennsylvania, for the surface to belong to one owner, and the coal which

it covers to another. Both the surface and the coal are held by deeds executed, and delivered, and recorded in the same manner; and there is no more reason for considering the coal an incorporeal hereditament, because it has not been opened, than there is for considering the soil such, because it had not been plowed. Still less reason is there for calling it an incorporeal hereditament, if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal instead of describing the coal without the customary circumlocution. In all these cases, where the right, rather than the thing, is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold. And where that is a coal bed, it is an abuse of language, and an unnecessary application of legal distinctions, to call it an incorporeal hereditament. Some late English cases indicate an inclination in their courts to treat these mine rights, as we think they should be treated, as corporeal herditaments. In the case of *Humphries* v. *Brogden*, 1 Law & Equity R. 241, the action was on the case, by the surface owner against the mine owner in an adjoining lot, for removing the subjacent mineral strata, whereby the natural support of the plaintiff's lot was taken away, and it subsided, greatly to his injury; and in *Jeffries* v. *Williams*, Id. 433, the facts were similar. Throughout both cases, the mine right, severed from the ownership of the soil, was regarded as a separate close, and compared to the lower story of a building, which the owner is bound to keep in a suitable condition to support the upper stories, owned by others, as the owner of the upper story is bound to maintain the roof, for the protection of all below him.

It may be thought somewhat incongruous to apply the name of land to both the surface and the underlying mineral strata, where they have been severed in title; but it is more incongruous still to treat the surface as a corporeal hereditament, and the mine right, when granted in terms so large as to comprehend the whole mineral deposit as incorporeal.

It would be more according to analogy to consider the surface an incorporeal interest, for it is the production of that which ordinarily makes it valuable. Whilst its natural fruits are reaped, the soil itself is not removed. Not so of stone coal.

The *corpus* itself is taken, and that is a more real and substantial interest than the fruits of the surface. If the surface be a corporeal hereditament, much more must the mineral *substratum* be. And regarding them both as land, and applying to both the same legal remedies, we hold the owner of each to the maxim, *sic utere tuo ut alienum non lædas*, and to all the obligations of good neighborhood; whilst, by maintaining a distinction between them, which has ceased to have foundation, we embarrass the respective owners in the exercise of their rights, and ourselves in the application of legal remedies.

We hold, in conclusion, that the parties to the deed of May 27, 1831, intended an absolute and exclusive grant of all the coal under the grantor's land; that though severed from the surface, it was still a conveyance of land, and not a mere license or common. The consequence is that the grantees held it as other real estate is held, and might part it among themselves, as land is divided; and that the defendants, entering in pursuance of such partition, were not trespassers, and ought to have had the judgment.

The judgment is reversed, and judgment is entered for defendants for costs.

On the trial of the present suit, the plaintiff offered to prove by parol, the circumstances under which the original purchase was made, the motives which prompted it, together with the opinion of the parties, at the time, as to the extent of the interest conveyed. The original articles of agreement were also offered in evidence for the same purpose.

The court below rejected this evidence, to which the plaintiff's counsel excepted; and the learned judge having directed the jury to find for the defendant, and a verdict and judgment having been rendered accordingly, the plaintiff sued out this writ, and here assigned for error the rejection of the evidence offered on the trial, and the charge of the court below.

COWAN, for the plaintiff in error.

FOSTER, for the defendant in error.

The opinion of the court was delivered by STRONG, J.

The record presents the same question which was here at October Term, 1855, in an action between the same parties. The writ of error is designed to bring under review the adjudication which was then made. At that time, this court was of opinion that the deed from Caldwell to Greer was an absolute and exclusive conveyance of all the coal under the grantor's land, and not a mere licence, or incorporeal hereditament. Such a construction of the deed is supposed to have been erroneous, and we have heard an earnest and able argument in support of the opposite interpretation.

The question is all-important to the rights of the parties; for if the interest of the grantee is incorporeal, and not exclusive, it is necessarily indivisible; and Greer, having divided it by his own act, by alienation of part, extinguished it: 4 Co. 1; *Van Rensselaer* v. *Radcliff*, 10 Wend. 639. On the other hand, if the deed was a grant of all the coal, it might be conveyed without extinction of the right, either in entirety or in parts.

The deed conveys in fee two tracts of land, and in its granting part, after describing the tracts, by metes and bounds, adds, "also the full right, title and privilege of digging and taking away stone coal, to any extent the said George Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said James Caldwell; provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises." Then follow the *habendum* and covenants of warranty, in one of which this subject of the grant is called "the aforesaid right to the stone coal," and in the other "the right of stone coal hereby given." The consideration mentioned is single for the entire subject conveyed by the deed. It is to be observed in the description of the thing granted, that there are no limits fixed upon the extent to which coal might be taken from the land then owned and occupied by the grantor. The grantee's right was co-extensive with his will; not necessarily to be exercised by himself, but one which might be enjoyed by others whom he should authorize. No form of words other than those employed could have given him larger dominion.

Coal and minerals in place are land. It is no longer to be

doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. It is not denied in such a case that both are land owners, both holders of a corporeal hereditament. Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine,—separate from the ownership of the surface,—because livery of seizin was in their minds inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was that they were disposed to regard such rights as incorporeal, though they are not rightly issuing out of land, but the substance itself. In this State, however, livery of seizin is supplied by the deed and its registration, and there is nothing incongruous in considering a grant of the *substratum* a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning. Even in England, so long ago as the reign of James I, it was held that ejectment would lie for a coal mine: *Comyn* v. *Wheatly*, Cro. Jac. 150. It was objected that it was beneath the soil, and that an *habere facias* could not be thereof; but the objection was disallowed. Yet ejectment can not be sustained for an incorporeal hereditament, except, perhaps, in the case of a common appendant or appurtenant. With us, unfettered as we are by the necessity of livery of seizin, and abounding in mineral districts, I am not aware that it has been seriously doubted that the ownership of a coal bed or seam is a corporeal interest in land. Cases not infrequently occur in which the owner of lands sells merely the surface right, retaining the minerals which lie in place below the surface. Now, as his whole interest was corporeal before the sale, and as by his deed only the surface passed, that which remains ungranted must be corporeal. This proposition needs no further argument, and it has not been questioned in the discussion before us. In *Turner* v. *Reynolds*, 11 Harris, 199, a plaintiff in ejectment was allowed to recover a coal mine which he had described in his writ as land, and this, though his title was under a conveyance to him, not of the tract of land, but of the coal.

If, then, the ownership of coals or other minerals in a tract

of land may be vested in one person, while the right to the surface belongs to another, the next inquiry is, by what words it may be granted. There are two modes in which the subject-matter of a deed may be described, both equally potential. The one is by a description of the thing itself, as of land by metes and bounds, or by a known name; and the other is by a designation of its usufruct, or of the dominion over it. Thus a grant of the rents, issues and profits of a tract of land is uniformly held to be a grant of the land itself: Co. Litt. 4 b. Judgments abound to this effect in regard to devises, and though in wills and deeds the rules of construction differ relative to words limiting the estate granted, yet they are the same of words describing the subject-matter of the grant. There are also cases of the same character to be found in regard to deeds. Thus it has been held that by the grant of a boilery of salt the land passes, for that is the whole profit: Co. Litt. 4 b; or a mine of lead, *Id.* 6 a. So, by the grant of all growing trees: Cro. Eliz. 522. See, also, 4 Mass. 266; *Fish* v. *Sawyer*, 11 Conn. 545. The reason is that the grant of a thing can be no more than the grant of the full and unlimited use of it. So, too, the general power of disposal without liability to account, is equivalent to ownership itself, it being the highest attribute of ownership, and a gift of the one necessarily carries with it the other. This is the doctrine of *Morris* v. *Phaler*, 1 Watts, 389.

Applying these principles to the case in hand, why was not the deed of Caldwell to Greer a conveyance of the coal in the land owned and occupied by the grantor? Because, says the plaintiff in error, it is not a grant of the thing itself, but of a right to take it, and until it is seized or taken, the property in the thing remains in the grantor. But if the conveyance of the whole use of a thing, and of the absolute dominion over it is a grant of the thing itself, only differing in the mode of describing the subject, it is not easy to see what more Caldwell could have sold than he did. If in another form of words he had described the coal as the subject of the grant, Greer would have possessed no greater beneficial rights than were given to him by the form adopted. The ownership of the coal in the ground is but a "full right, title and privilege" to dig and carry it away, nothing more, nothing less. The words

employed in the deed express absolute dominion, and complete enjoyment. These constitute property, and all that is understood in proprietorship.

Again, says the plaintiff in error, this is but a grant of a right to take and carry away part of the profits and that while the grant of a right to take all the rents, issues, and profits of a tract of land is equivalent to a conveyance of the land itself, because it embraces their whole usufruct, a grant of a right to take part, such as "iron ore, coals," or "minerals" is not. It is said that in such a case the grantee can only take in common with the grantor.

The argument is based upon a misconception. The subject alleged to have been granted here is not the tract of land but the coal in it, which, as we have seen, is capable of a separate conveyance, and which may be vested in one person, while the ownership of the tract of land, as such, may be another's. The alleged subject of the grant then being the coal in the land, the *substratum*, the agreement is inapplicable. The whole usufruct of that, as well as the entire dominion over it, was granted. The deed is not a conveyance of part of the usufruct, nor of the usufruct of part of the coal, but of the entire enjoyment. As already said, there was no limit to the grantee's right but his own will. He could take out coal to any extent. He could cause it to be taken out to any extent, and at all times under any of the land. He was accountable to no one. His entrance to it and his exit from it were indeed required to be on his own land; but the right to take the coal itself was absolutely unlimited. It would seem, therefore, that, according to well established rules of construction, the deed of Caldwell to Greer was a conveyance of the coal itself, and not of a mere easement, or incorporeal hereditament.

It is contended, however, that such a construction is in conflict with the authorities, and we are referred to Lord Mountjoy's case as the leading and principal one. That was decided in the reign of Elizabeth, and is reported by Goldbolt, case 24; by Leonard, 4 Leon 147; by Coke, Co. Litt. 104 b, and by Moore, 174. It is, however, more fully reported in some aspects, by ANDERSON, C. J., who was one of the justices who decided it. In his reports, page 307, we have the words of the reservation given at length. They are "Provided always,

and it is covenanted, granted, concluded, and agreed between the said parties to this indenture; and the said John Brown and Charles, and their heirs, covenant and grant to and with the said Lord Mountjoy, his heirs and assigns, at all times hereafter to have, take and dig, in and upon the heath ground of the premises, from time to time, sufficient ores, heath, turves, and other necessaries for the making of alum and copperas." This was very properly held to have been a grant of an incorporeal hereditament. Unlike the case we have under consideration, it was not a grant of unlimited dominion over the ores and turf. It was not a grant of a right to dig, take, and carry away without stint, but only sufficient for a single specified purpose, viz.: the manufacture of alum and copperas. It was very aptly likened to a grant of common *sans nombre*, but was not an exclusive right. Surely there is very little resemblance between that case and the present. It is not at all in conflict with the construction we place upon Caldwell's deed to Greer.

Then follows the case of *Chetham* v. *Williamson*, 4 East, 469, where the subject was not described in the granting part of the deed, nor in connection with the other property conveyed. The grantee after the *habendum* covenanted that it should be lawful for Hyde, one of the grantors, and his heirs, "at all times to enter into all or any part of the premises to search for and dig for coal or stone or any other mine or mineral whatsoever, and the same to take, have, and carry away to his own use, provided and upon condition that it should and might be lawful for the grantee, his heirs, etc., to deduct from the rent reserved by the grantor out of the land, all or so much as should be reasonable for any hurt, damage, or prejudice that should be done to the premises by reason of digging for, or carrying away any of the mine or mines aforesaid." The question was whether the alienee of Hyde, one of the grantors, who had conveyed only an equity of redemption, could maintain trover against the covenantor for coals taken out of the land by him. It was held that he could not. LAWRENCE, J., placed the judgment upon the ground that the covenant could not operate as an exception or reservation in favor of Hyde, who had no legal estate in him at the time, but only the equity of redemption. He said that Hyde, "be-

ing a stranger to the estate, he could not expect that which he had not before. The covenant, therefore, could only operate as a grant, but a grant will not pass the land itself without livery." Lord Ellenborough confined his attention to the question whether the grant was exclusive. The differences between the case and the present one are sufficiently obvious. It is one very material distinction, that in *Chetham* v. *Williamson*, the right to take coal or minerals was not a thing for which the consideration mentioned in the deed was given. They were to be paid for when taken. In a deed of bargain and sale, it is the payment of the consideration which transfers the use, and with it the legal title. The case is also illustrative of the fetters which the doctrine of livery of seizin has imposed upon the construction of deeds.

We are next referred to *Doe* v. *Wood*, 2 Barn. & Ald. 719, where the grant was called a license, and where the privilege was to dig, work, mine, and search for tin, etc., and dispose of what might be found during a term of twenty-one years. The court held it to be a license on the ground, among others, that it was a right to dig, search for, etc., "the minerals that should within that term there be found," and not a grant of the entire subject. The indenture also contained covenants of the grantee to render a share of the ore he might find, and to allow the grantor himself to drive adits. The case is no authority in support of the argument of the plaintiff in error.

The only other case to which we are referred is *Grubb* v. *Bayard*, 2 Wallace Jr. 81. There the grant was to dig, take and carry away all iron ore to be found within the bounds of a tract of land of the grantor, provided the grantee should pay unto the grantor, his heirs and assigns, the sum of sixpence for every ton taken from the premises. This was held to be an incorporeal hereditament. It will be observed, that there was no present consideration passed, nor was there a covenant of the grantee to search for or take any ore. He might never have taken any. In that event, if the deed had been held a conveyance of the iron ore, there would have been a sale without a consideration. Nor was it a grant of the whole, but, said Mr. Justice GRIER, of the iron ore that should be found within the term, and on that account was but a license. He also re-

marked that "if it had been a grant of an absolute property in all the iron ore in the tract, the deed would have been insufficient to convey title without livery of seizin." This observation goes beyond the English cases, and is not necessary to the judgment rendered. In *Grubb* v. *Bayard*, Judge KANE delivered a concurring opinion. In it, he refers to the absence of a covenant by the grantee to work the mines, and thus make the rent reserved, of value, as a circumstance of much importance in determining the intentions of the parties. That it is so, is obvious, for without it the contract might have proved entirely fruitless to the vendor, while in the present case, Caldwell has received all that he ever can receive. The right, whatever it is, is one for which all the consideration has been paid.

These are all the cases adduced to sustain the doctrine that a conveyance of a right to dig, take, and carry away the coal or minerals in a tract of land, though the grant be unlimited in quantity, time, or purpose for which the minerals may be taken, conveys no interest in the coal or minerals until they are taken, passes only an incorporeal hereditament. None of them were decided upon the ground of any supposed distinction between a right to take all the coal and carry it away and a right to the coal itself. They are all cases in which there was no unrestricted power of taking and disposition conferred upon the grantee. The coal or minerals was to be taken either for a limited purpose, or in restricted quantities, and generally was not to be paid for until taken. And in most of them it is easy to see that the supposed necessity of livery of seizin, in order to pass a corporeal interest in land, was a controlling consideration in the minds of the judges. Even in *Grubb* v. *Bayard*, it seems not to have been without influence. The impossibility of making livery is, however, in Pennsylvania, no reason for refusing to give a construction to a deed accordant with the intention of the parties. When the intent is to give the entire usufruct and power of disposal, the legal title must be held to pass. Even in England livery of seizin is no longer indispensable to the grant of a corporeal hereditament. Unopened mines may be conveyed, and the grantee takes more than a right issuing out of land, or exercisable therein. He takes the mines themselves. In *Stoughton* v.

Leigh, 4 Taunt. 402, a widow was held entitled to dower of mines, not only in lands in which her husband had been seized in his life-time and during coverture, but also in those which were in the lands of other persons, the minerals, or *substratum* of which had been conveyed to him. It was also ruled, that in assigning her dower, the sheriff should set off to her not one third of the profits, but one third of the mines themselves, and that the partition might be made either by metes and bounds, or by directing separate alternate periods of enjoyment.

It is not strange, therefore, that it had been held in this State before the controversy between these parties was first here, that an unrestricted right to take and carry away all the coal in a tract of land is a corporeal right and exclusive. In *Benson* v. *The Miners' Bank*, 8 Harris, 370, we have this case: Reese was seized of two undivided third parts of a tract of land, and of one fifth of all the fossil coal under it. He made a deed for the tract to Kepner, containing the clause, "excepting and forever reserving the liberties and privileges for the heirs and legal representatives of Samuel Potts, deceased (of whom he was one), to dig, take and carry away all the stone coal that is or may hereafter be found on the above described tract of land." The judgment of this court was, that the deed conveyed no part of the stone coal to the grantee of the land. Of course it remained reserved or ungranted as a corporeal hereditament.

Thus, after a careful review of the question, we are constrained to hold that, by the deed from Caldwell to Greer, the title to the coal in the lands then owned and occupied by the grantor was conveyed, and not a mere license or incorporeal right. Such was the opinion of this court in 1855, when the same deed was here for construction, and the very able argument of the counsel for the plaintiff in error has failed to convince us that the court was then mistaken.

There are some exceptions to the rejection of evidence offered in aid of the construction of the deed. The offers were to show by the testimony of Greer, taken after he had parted with the interest granted, the circumstances under which the original purchase was made, and the motives which prompted to it, together with his opinion and that of his

grantee's as to the extent of the interest which passed by the deed.

The original articles of agreement were offered for the same purpose. This evidence was not submitted to show fraud or mistake in the deed, nor had it any tendency to show either. Its purpose was to control the meaning of the words which the parties used. It is, however, the settled rule, that a deed must be construed *ex visceribus suis*. When the intent is clearly expressed, no evidence of extraneous facts or circumstances can be received to alter it: *Means* v. *Presbyterian Church*, 3 W. & S. 303; *Brown* v. *Nickle*, 6 Barr, 340; *Lyon* v. *Miller*, 12 Harris, 392. It may be admitted that when the deed leaves the subject-matter of the grant in doubt, parol evidence may be resorted to in order to ascertain it, but the nature and quantity of the interest conveyed is always to be ascertained from the instrument itself. Here the inquiry is, what dominion or ownership, if any, in the coal Caldwell granted, and that must be determined exclusively from the words which he employed. The evidence was therefore rightly rejected.

Judgment affirmed.

CLARK v. MCELVY ET AL.

(11 California, 154. Supreme Court, 1858.)

Bill of sale—Caveat emptor. A bill of sale for a mining claim not under seal, purporting to convey only the interest of the vendor without warranty, conveys only the present right of the maker of such instrument. The purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies in every such case.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

Ejectment to recover a mining claim.

The case was tried before a jury, who, under the instruction of the court, returned a verdict for the plaintiff. It seems that one Matteson, in 1853, was possessed of a certain piece of mining ground, and in consideration of a note made by

one Head and one Flippen, with one Grier as surety, in July of the same year, executed and delivered a bill of sale of the ground to Head and Flippen, jointly. Evidence was offered, in the course of the trial, tending to show, if credited, that Head and Flippen, after getting the bill of sale, went to the ground, not far off, and found some other persons in possession. They then returned to Matteson, and informed him of the fact. The bargain was thereupon rescinded, the note destroyed, and Flippen agreed to destroy the bill as soon as he returned to his cabin, where it was. It had not been recorded. Matteson, Head, Flippen, and others then determined to drive the persons in possession off the ground. They did so, and kept the possession themselves. Two or three days afterward Flippen sold the claim, or his interest in it, to Clark, the plaintiff below. Matteson, shortly after this sale, sold the interest or share to Head, who thereby, as claimed, became owner of the entire claim. Head remained in possession, working this and other claims, forming a compact body or tract of land, for several years, and until sold to the defendant below. In December, 1857, Clark, the plaintiff, brought this suit.

It seems to be assumed, in the instructions and in the argument, that some proof was made that Flippen, at the time of the sale to Clark, was in possession, and showed Clark the bill of sale from Matteson, or that Clark saw it, or had knowledge of its existence and contents; and we assume that this is true.

The bill of sale from Matteson to Head and Flippen is not in the record. The bill of sale from Flippen to Clark is, in these words:

"NEVADA, July 5, 1854.

"Know all men by these presents, that in consideration of two hundred and fifty dollars, in hand paid and this day received, I hereby sell and transfer all my right, title and interest—said interest being one fourth—in claim situated, etc., on Little Deer Creek, and known as Booth & Co.'s claims, unto J. M. Clark; in token of which, I hereby set my hand and seal, this day.

"(Signed) WILLIAM ⋈ FLIPPEN.

"G. H. GRANT, Witness."

No seal is affixed to the name of Flippen.

The first instruction of the court was as follows:

"That if the jury believed from the testimony that Head and Flippen purchased two interests in the ground in dispute, gave a joint note with Grier as security, and received a joint bill of sale; that on finding other parties claimed the ground, they returned to Matteson, from whom the ground had been purchased; that an agreement was then made to cancel and annul the sale of said claims, for the surrender of the bill of sale, and that the joint note was given up and canceled, but the bill of sale being away, was not given up—then as between the parties and all parties having notice, these acts worked as a cancellation of the bill of sale. But if, notwithstanding such agreement, Flippen neglected to destroy the bill of sale, as he had promised, and that Clark, upon the strength of the bill of sale, knowing it had been executed, and not knowing of the agreement to cancel, was induced thereby to purchase—then he would be entitled to recover against a subsequent purchaser of the same interest from Matteson; and at request of defendants' counsel, the court said to the jury, that if Clark was not induced to purchase by the bill of sale (or if the bill of sale was not the principal inducement to the privileges), then those holding under Matteson subsequently are not estopped from setting up claim against Clark."

Plaintiff had judgment, and the defendants appealed.

MEREDITH & HAWLEY, for appellants.

BALDWIN, J., after stating the facts, delivered the opinion of the court; TERRY, C. J., and FIELD, J., concurring.

It is not very material, in the view we have taken of this case, whether we regard these mining claims as real or personal estate. The bill of sale from Matteson to Flippen and Head may be left out of the question. The bill from Flippen to Clark only purports to convey to the latter the right, title, and interest—whatever that was—of the grantor. If Flippen had no real interest, by reason of the cancellation of the contract of sale, he could convey none, by such a contract as that in evidence, to his grantee.

The bill of sale, not being under seal, even if it were other-

wise sufficient to pass the legal title to real estate, did not pass any in this instance: it passed only an equity, and this equity is subordinate to the legal title or to any superior equity. This was decided in the case of *Dupont* v. *Wertheman*, 10 Cal. 354. In such case, as shown in the case cited, the assignee stands in the shoes of his assignor.

The instrument does not pretend to be a conveyance of the land, but only of the right, title, and interest in it, and this without warranty. It is held in such cases that the instrument only conveys the present right or title of the party granting. The purchaser takes the risk of any infirmities or defects of title which may exist: *Adams* v. *Cuddy*, 13 Pick. 463; *Morse* v. *Godfrey*, 3 Story, 364; 1 Cow. 613; 9 Ib. 13; 4 Kent, 261; 12 Pick. 47; 13 Ib. 116, 460; 14 Johns. 193; 20 Ib. 478; and 11 S. & R. 389, cited in case of *Dupont* v. *Wertheman*. The doctrine of *caveat emptor* applies in every such case. It was the duty of Clark, under such circumstances, to inquire of Matteson into the true state of the title; or if he buys only the interest of the grantor without such inquiry, he must run the risk of his speculation. The title being really in Matteson, or Matteson, after the cancellation, having on the hypothesis of fact assumed the superior equity, Clark would get nothing by his purchase under the contract evidenced by this bill of sale. The defendant succeeding to the title of Matteson, has the same rights.

There is nothing in the point made by the respondent, that no exception was taken to separate portions of the charge. It will be seen that the charge is so connected as that each part relates to the rest, and the substance of it opposes the view we have just presented. Nor is there anything in the point that the court gave the instructions asked by the defendant; which, considered alone, seem to place the law substantially as we have given it. If the instructions were directly contradictory, this would be a good ground for reversal. If to be taken altogether, the one set qualifying the others, then the error we have pointed out exists.

We are not to be understood as expressing any opinion, or giving any intimation whatever as to the facts of this case. It is for the jury to pass upon them. The parties are entitled to have the law applicable to any supposed hypothesis of fact

of which there is legal evidence distinctly given to the jury, that they may apply the law to the proofs.

The judgment is reversed, and the cause remanded.

Judgment reversed.

BUSHNELL v. PROPRIETORS OF THE ORE BED IN SALISBURY.

(31 Connecticut, 150. Supreme Court of Errors, 1862.)

Grant of right to flow tailings.[1] The plaintiff conveyed to defendants the right to discharge dirt from their ore washing on his meadow lot. The tailings accumulated and spread so as to flow down upon the plaintiff's pasture lot, which lay below. *Held*, that the damage was an incident to the grant and that defendant was not liable.

Incidents to grant. A grantor is presumed to convey everything incidental to the enjoyment of the grant, so far as the same may be in his power to yield.

Deed construed against grantor. The rule that a deed is to be construed most strongly against the grantor applied to a forced or judicial deed.

The action was in case for damage to the land of plaintiff, from slacks and dirt washed upon it from the ore works of the defendants; tried to the jury in the Superior Court upon the general issue, with notice of the defense below stated, before SEYMOUR, J.

The defendants claimed the right to discharge the slacks and dirt from their works upon the land of the plaintiff, under an award formerly made between the plaintiff and themselves on the subject, and under a deed conveying to them the right given by the plaintiff in compliance with the award, and on the trial offered in evidence the submission, award and deed. The submission was as follows: "This agreement between the Proprietors of the Ore Bed in Salisbury and Albert Bushnell, witnesseth: That said parties have agreed to submit the matter in controversy between them in relation to the damage claimed by said Bushnell to have been sustained by him by the washing of ore by said proprietors at their ore bed in

[1] It will be perceived that neither side cite authorities in their arguments and those quoted by the court have little analogy.

Salisbury, and the discharge of slacks into a stream of water that runs through the meadow and land of said Bushnell to the arbitrament and final award of Richard Smiths, Robert N. Fuller and William H. Walton, who are to notify and meet the parties as soon as may be convenient, at the public house in Lakeville, and shall examine the land of said Bushnell, on which it is claimed damages have been sustained, which lies on both sides of the highway leading from Josiah N. Reed's to said Bushnell's dwelling house; and they shall assess such damages in favor of said Bushnell as they shall find he has sustained since the last payment made to him by said proprietors; and shall also assess, as near as may be, such damage as shall accrue to said Bushnell in the future by a continuance of washing ore by said proprietors, and the necessary discharge of slacks into said stream in the ordinary manner of washing ore, and by the floating or carrying of dirt, slacks and particles of ore upon said land; and upon the payment by said proprietors to said Bushnell of the damages assessed, it is agreed that said proprietors and their successors shall forever stand discharged of all further claim for damages, past and future, occasioned, or that may be occasioned, by the washing of ore by said proprietors.

"And the said Bushnell hereby agrees that said arbitrators shall have power to order the execution by him of such lease, leases, releases or instruments, as in their judgment may be necessary to protect the said proprietors and their successors from and against any future claim for damages for future injuries to said lands that may be made by said Bushnell, his heirs or assigns, in consequence of a continuance by said proprietors and their successors of the business of washing ore in said stream, and the carrying of dirt, slacks and fine ore onto said lands of said Bushnell before described; and, upon the payment or tender of said damages, said Bushnell hereby agrees and binds himself to execute, with all due solemnities, any such leases, releases or instruments as said arbitrators may prescribe. Witness the said parties, this third day of June, 1858."

The material part of the award was as follows: "That the aforesaid proprietors pay or tender to said Bushnell the sum of $650, within thirty days from date, and that said proprie-

tors shall stand acquitted and discharged from any and all damage that has occurred in time past, or which may occur in any time to come, to said Bushnell, by a continuance of working ore by said proprietors, and the necessary discharge of slacks, dirt and particles of ore into the stream of water mentioned in said submission, in the ordinary manner of working ore and by the floating or carrying of said slacks, dirt and particles of ore into and upon the lands of said Bushnell, mentioned in said submission. And we do also award that the said Bushnell shall execute and deliver, without unnecessary delay, to said proprietors, the following instrument which is hereunto annexed. Dated this 8th day of July, 1858."

The material parts of the deed, which was executed on the same day that the award was made, were as follows:

"To all people, etc., know ye that I, Albert Bushnell, of the town of Salisbury, * * do give, grant, bargain, and sell unto the Proprietors of the Ore Bed in Salisbury aforesaid, their successors and assigns forever, the right to wash iron ore at their ore bed in said Salisbury, in that certain stream of water which flows from said ore bed through the lands of Newton I. Reed, and near to the Chatfield ore bed, into and through that certain lot of land lying on the west side of the highway leading from Josiah M. Reed's dwelling house to my residence in said Salisbury, containing about six and one half acres; also into and through that certain other lot of land lying directly opposite the before mentioned lot of land, and on the easterly side of said highway, called my home meadow, containing about fifteen acres; with the right and privilege to discharge, float or carry slacks, dirt and particles of ore into and upon said parcels of land, which may accrue, float or be carried in said stream of water and discharged on said land, from and by the ordinary mode and manner of washing iron ore in said stream, by said Proprietors of the Ore Bed in Salisbury aforesaid; and also the right to use the engine, or a similar one in operation, for the purpose of discharging water with the dirt and slacks therein. To have and to hold the before mentioned rights and privileges unto the said Proprietors of the Ore Bed in Salisbury, their successors and assigns forever. And also I, the said Bushnell, do for myself, my heirs, executors, administrator and assigns, covenant to

acquit and discharge said proprietors, their successors and assigns of and from all damages and injuries which have been, or which hereinafter may be done, in and upon said parcels of land, by the washing of iron ore in said stream, in the way and manner aforesaid, and of the carrying, floating and discharging of dirt, slacks and particles of ore into and upon said lands in consequence of said washing of ore as aforesaid. And it is further understood, that the said Bushnell shall not be compelled to open ditches on said lands to carry said particles of ore and slacks through said lands, but the said Bushnell shall be permitted to allow said slacks and particles of ore to go and flow upon said lands where they are inclined to go and where the water may take them. Nor is it understood by this instrument that the said Bushnell shall be liable to pay damage for said slacks and particles of ore if they go and are carried upon the highway, or upon lands of adjoining proprietors."

The defendants contended that they had washed ore in the stream only in the ordinary manner, and so had done only what by the foregoing award and deed they had a right to do. The plaintiff admitted that the defendant had washed ore only in the ordinary mode and in accordance with the requirements of the award and deed, but claimed to recover for damage done to a piece of land known as the "pasture lot," not described in the instrument, and as to which he claimed that no rights were given to the defendant, which adjoined the "meadow lot," described in the instrument, and upon which slacks and dirt spread and were washed from the meadow lot, on which they had accumulated in a very great quantity, filling up the bed of the stream and raising the meadow lot above the adjoining land, so that the dirt washed upon it passed over upon the adjoining land. This lot was owned by the plaintiff when the deed was given. He also claimed that the defendants were liable for damage done to the "home meadow" by dirt washed upon it by the stream, from deposits of dirt made by the defendants on the banks of the stream near the works. The defendants denied that any damage had been done in the mode last stated, and requested the court to charge the jury that they were not liable for any damage done to the pasture lot in the manner claimed. The judge did not

so instruct the jury, but charged them *pro forma*, that the award and deed did not justify the defendants in washing slacks and dirt upon the pasture lot, subject, however, to this qualification, that they were liable only for the natural and necessary injuries resulting to the pasture lot, and that the plaintiff could not recover if by the use of ordinary and reasonable care he might have confined the dirt and slacks to the meadow lot, and then have prevented injury to the pasture.

The jury were requested by the court, if they should find for the plaintiff, to assess by itself the injury they might find, if any, done to the pasture lot by washing ore; but the jury found a general verdict for the plaintiff. Before the acceptance of the verdict, the court inquired if they assessed anything for damage to the pasture lot, to which the jury replied that the whole amount of their verdict was for damage done to the pasture lot, and that they could not agree in finding any damage except to that lot.

The defendants moved for a new trial for error in the charge of the court.

HUBBARD & PEET, in support of the motion.

The submission and award are to be taken with the deed in determining the construction of the latter. The submission and award show clearly that it was the intention of the parties to provide against all future controversy with regard to any damage that might be caused by the washing of dirt and refuse matter upon the plaintiff's land, and to secure to the defendants the full use of the stream for the discharge of such refuse matter. But independently of the submission and award, the deed taken by itself gives the defendants all the rights necessary for their justification in this case.

The deed is to be construed most strongly against the grantor. The fact that it was given under an award does not make it any the less the grantor's act. He voluntarily submitted to the arbitrators the question whether he should give such a deed, and they had no power to order it except by his consent thus given. If construed as ordinary deeds are construed, it will be held to pass to the grantees, as incident to the principal thing granted. The liability of the dirt, as it accumulated on the meadow lot, to pass over upon the adjoin-

ing land, was well known to the plaintiff when he gave the deed, and it is obvious from the provision in the deed that the plaintiff was not to be liable for the damage to adjoining lands, that he had this risk in mind. He owned this pasture lot when he gave the deed, and could have made some provision for its protection if he had chosen to do so. As it is, he can not deny to the defendants the privilege, which is expressly given, of discharging dirt upon the meadow lot, and so long as they do only this they are not liable for the incidental injury resulting to his adjoining land. The finding of the jury, that no damage was done except to the pasture lot, is equivalent to a finding that no damage was done by the washing down of dirt from the heaps deposited by the side of the stream and that all the damage resulted from the washing of ore in the ordinary mode.

BUEL and WARNER, with whom was GRANGER, *contra*.

The charge of the court was right. The defendants acquired by the deed the right to wash dirt upon certain specified and described lots of the plaintiff. A servitude was created upon those particular lots. In the pasture lot they acquired no right whatever, unless by implication. But how can the right to cover the meadow lot with dirt imply also the right to cover the pasture lot? It is clear that in awarding compensation for the land to be covered the arbitrators estimated merely the two lots specified in the award. It can not be presumed that the plaintiff gave up all his land to the defendants. If it be said that the flowing of the pasture lot is necessary to the reasonable use of the meadow lot, we reply that it can not be so, since the defendants need not have filled the meadow lot so full, or might easily have kept a channel open through it for the stream. If they could not do this they should have secured the wash from overflowing upon the adjoining land in some mode. It was not reasonable to require the plaintiff to do this. He had received no compensation for this expense. and the jury have found that he could not have confined the wash to the meadow lot by reasonable and ordinary care. The defendants had a right to use the meadow lot for their dumping ground but this gave them no more right to occupy the adjoining ground than in any other

case of such an easement in a specified piece of land. They had a right to put all they pleased on that lot, but they had no right to put it anywhere else. If they had had a right to cart the dirt upon that lot they would have had no right to pile it so high that it would tumble or wash upon that adjoining.

As to the construction of the deed: It is not a case for the application of the ordinary rule that the construction is to be most strongly against the grantor. The deed is to be taken in connection with the award, and in that connection is to be regarded rather as a judicial instrument than as the mere voluntary act of the party. The deed is not only required by the award, thus making it compulsory on the plaintiff, but the very language of it is prescribed by the award. The arbitrators award that the plaintiff shall execute this precise deed, which is annexed to the award and made a part of it. Thus the ordinary reason why the language of a deed shall be taken most strongly against the grantor, viz., because it is his own language, voluntarily chosen by him, does not apply here. It is like the case of a decree in chancery, which is not to be regarded as the language of the party against whom it is made, but of the court.

DUTTON, J.

The principal question in this case is, what right the defendant acquired by a certain award and a deed given in pursuance thereof, to float dirt, slacks and particles of iron ore upon the land of the plaintiff. The submission, award and deed are fully detailed in the motion. It has been claimed by the counsel for the defendants that the right conferred on them by the award is more extensive than that specified in the deed, but the view which we take of the case renders it unnecessary to see whether there is any such distinction, or what would be the effect of it.

The deed conveys the "right and privilege" "to discharge float or carry slacks, dirt and particles of ore into and upon said meadow (and the lands described), which may accrue, float or be carried in said stream of water and discharged on said lands, from and by the ordinary mode and manner of washing iron ore in said stream, by the Proprietors of the Ore

Bed in Salisbury." It is admitted that the plaintiff owned the pasture lot on which he claims the injury was done when he gave the deed, and that it lies adjoining the meadow; that so far as this question was concerned the defendants washed their ore in a proper manner, and that the injury to the plaintiff's pasture resulted from the flow of the water, surcharged with the result of the washing, from the meadow upon the pasture land.

The plaintiff insists that he conveyed only the right to deposit the particles of dirt, etc., upon the meadow. This is denied by the defendants. The question for us to decide is, what right was in fact conveyed. The construction of the deed, if it is doubtful, must be taken most strongly against the grantor. We do not think it partakes sufficiently of the character of a judicial deed to vary the construction. The language of the deed is apparently that of the grantor. It does not appear that he objected at all to the terms of it. At all events the award would of itself convey quite as full a right as the deed does.

In civil as well as in criminal matters men are presumed to intend the probable consequences of their acts. A grantor is presumed to intend to convey, so far as it is in his possession, whatever is necessary to the reasonable enjoyment of the thing conveyed. It is well settled law that if the owner of a lot conveys it to another person while there is upon it a dwelling house with windows opening upon another lot of the grantor, neither he nor his heirs or assigns can erect a building upon the second lot so near as to exclude the light from the dwelling house: *Rosewell* v. *Prior*, 6 Mod. 116; *Story* v. *Odin*, 12 Mass. 157. In such a case the deed conveys a privilege extending beyond the limits of the lot conveyed, although not named in the deed.

If A should grant to B the privilege of ponding his land up to a given line, it would not be contended that A would have a right of action against B, although the ponding should render his adjacent land marshy and less valuable. We think the principle involved in such cases is applicable to the present case. The defendants clearly had the right to make the water of the stream flow and leave deposits all over the meadow. But it manifestly would not all remain on the

meadow unless confined there by some artificial embankment, which the defendants were not bound to make, and would have no authority to make. The parties must therefore have contemplated such a result as has in fact followed the flowing.

The submission furnishes evidence that if the plaintiff had intended to reserve a right of action for this unavoidable flowing of his pasture lot, it would have been provided for. It speaks of damage claimed by the plaintiff to have been sustained, and provides for such as should accrue, showing that the parties intended to put an end to all further dispute or controversy. Why should they do this and still leave room for further difficulty?

The deed also guards against any liability on the part of the plaintiff by reason of the flow of the water from the land upon the land of other adjoining proprietors or upon the highway. The fair inference is that the plaintiff had in mind the tendency of the privilege which he had granted to injure the adjoining land. From his silence with reference to his own, it is reasonably to be inferred that he intended to abide the consequences.

What has been said is not intended to apply at all to the right of the plaintiff to recover for whatever damage he can prove he has sustained, either in the meadow, pasture lot, or other land belonging to him, caused by the deposit of dirt, slacks, etc., which were not the result of the washing of ore in the ordinary manner.

It was claimed by the counsel of the defendants, that inasmuch as the jury did not find any damage outside of the pasture lot, it was virtually finding that no damage was done to the plaintiff's land except by the washing of ore in the ordinary manner, as they say that if any such damage had been done it would have first injured the meadow.

It is unnecessary to notice this claim, as a new trial must be granted for error in the *pro forma* charge of the judge, and the verdict being thus annulled, can not be used for any purpose.

In this opinion the other judges concurred.

COPPER HILL MINING COMPANY v. SPENCER ET AL.

(25 California, 18. Supreme Court, 1864.)

[1] **Oral sale of mining claim.** An agreement by the locators of a mining claim to make an oral transfer of their respective interests in the claim at the time in the adverse possession of another, is not sufficient to pass title. Under such circumstances, a written instrument is necessary.

An oral sale is valid only where grantor is in possession, and accompanies the sale with a transfer of possession.

Appeal from the District Court of Calaveras County, Sixteenth Judicial District.

M. G. COBB, for appellant.

GEORGE CADWALADER, for respondents.

SAWYER, J.

This is an appeal from a judgment of nonsuit and the order denying a new trial. The suit was brought to recover six hundred feet of mining ground. The evidence of the plaintiff shows that a party of miners, on or about the 1st of June, 1861, located, in the usual mode, three thousand feet or more in length on a copper ledge, and commenced the work of developing the mine; that from the 7th to the 10th of June—certainly as early as the 10th—the defendants also located, by putting up notices and immediately commencing work upon it, that portion of the same lode now in controversy, and that they have ever since been in possession, claiming it under said location; that on the 26th of the same month the locators first named and their assigns, in pursuance of the statutes of California, organized themselves into a corporation under the name of the Copper Hill Mining Company, the present plaintiff; that the said parties then, to use their own phrase, "surrendered their claim to the corporation," and took stock in lieu of it. The language of all the witnesses on this point is nearly identical, and the following testimony of Mr. Brown will serve to express in the language of the witnesses all that was said in regard to

[1] Cited *Patterson* v. *Keystone Co.*, 30 Cal. 363, *Post* SALE.

the transfer of the title to the plaintiff: "I surrendered all my interests and those I was representing in and to said claim to corporation, Copper Hill Mining Company, plaintiff, and took certificates of stock in lieu. There were no deeds of this claim made to the corporation by any of the owners."

The following is also stated in the records as an admission by plaintiff: "Plaintiff here admitted that no deeds or conveyances in writing were made to the corporation by any of the owners or holders of said mining claim; that all rights, claim, and possession of, in, and to said mining ground, whatever the same might be, are surrendered and given up to the company and merged in said corporation, such owners receiving from corporation certificates of stock according to the amount so surrendered." The foregoing facts and testimony, together with subsequent work and other acts of possession and ownership, on behalf of the corporation, on portions of the claim outside of the ground dispute, constitute in the evidence of title upon which plaintiff relied for a recovery.

The appellant claims that under the decision in *Table Mountain Tunnel Company* v. *Stranahan*, 20 Cal. 198, the evidence establishes a title sufficient to authorize a recovery.

We think the principle announced in that case not applicable to the one under consideration. In the former case, the corporation had acquired the possession of the locators to the entire claim, and the defendants subsequently entered upon the possession of the corporation. In the present instance, the defendants entered into the adverse possession of the disputed ground before the corporation was formed, and they were in such adverse possession at the time of the organization of the corporation and the so-called "surrender" of the claims to the plaintiff, and the acceptance of the stock in lieu thereof by the locators. The corporation did not succeed to *the possession of* the locators in that part of the lode in dispute, for the reason that it was then, and it has ever since been, in the adverse possession of the defendants. The entry of the plaintiff upon such portion of its grantors' claims as was at that time in the possession of such grantors, did not draw after it the possession of that portion of their original claim which was then in the adverse possession of the defendants.

The locators could only surrender such possession as they had, and that, as shown by the plaintiff's own evidence, did not, at the time of the surrender, or at any subsequent time, extend to the mining ground in dispute. The *possession* of the ground in controversy having never been transferred to the plaintiff, it was necessary to show that the plaintiff had acquired *the title* of the locators under whom it claimed. The witnesses, with singular uniformity of expression, use the loose language: I "surrendered" my "claim" or "interest," "and received certificates of stock in lieu." They do not state what acts they performed which they regarded as constituting the "surrender." It is manifest, however, that these parties, like many others in like cases, were at the time of the transaction, acting under the erroneous impression that because they constituted the stockholders of the new corporation, they were, therefore, as to this mining enterprise, identical with the corporation itself, and that their title to the mining claims vested in the plaintiff by virtue of the act organizing themselves into a corporation for the purpose of working the mine. By that act alone, they only created an ideal being capable of receiving a conveyance of their respective interests in the mine. It did not invest the corporation with the title to those interests. In all probability, there was no formal attempt or agreement to transfer the title. But place the facts appearing in the evidence in the light most favorable to the plaintiffs, and the most that can be claimed for them is, that in consideration of the receipt of the certificates of stock, there was an agreement and attempt to make an oral, verbal transfer to the plaintiffs of the respective interests of the locators in the mining ground at the time in the adverse possession of the defendants. We think that such a transfer is insufficient to pass the title. Under such circumstances, a written instrument is necessary.

The appellant insists that the question as to the adverse possession of the defendants should have been submitted to the jury. The plaintiff's testimony clearly shows that the possession was adverse. The motion for nonsuit was made upon the close of plaintiff's testimony. It was not necessary to submit the question to the jury.

Judgment affirmed.

CRABY V. CAMPBELL ET AL.

(24 California, 634. Supreme Court, 1864.)

Parol evidence of sale. A witness testified that he purchased a mining claim of those who first located it, and held it until he conveyed it to the plaintiff. On cross-examination he testified that both conveyances were by written bill of sale. *Held*, that the writings were the best evidence of transfer, and that the court below erred in refusing, upon motion, to strike out the parol evidence.

Injury to plaintiff's flume by consent of his co-owner. In an action to recover damages for injury to a mining flume, caused by the defendants in cutting away a water ditch, the defendants offered to prove that one of the joint owners of the flume consented to the cutting of the ditch to avert other imminent dangers. *Held*, a good defense to the action for damages by the non-consenting co-owner.

All co-owners are bound by the acts of each. The consent of one binds all, and the others can not maintain an action for injuries done by the consent of one.

Appeal from the District Court, Eleventh Judicial District, Placer County.

The complaint averred that plaintiff was the owner of a mining claim which he worked by hydraulic process, situated a short distance below a ditch called the Miners' Ditch; that plaintiff, for the conveyance of tailings and water from his claim, had constructed a flume about seven hundred feet long leading therefrom; that in January, 1862, defendants, Weed and McClanahan, as agents of defendants Campbell and Powell, who were the owners of the Miners' Ditch, cut the embankment of the ditch, and thereby caused seven hundred inches of water to flow down upon plaintiff's flume, by means whereof it was injured.

Plaintiff recovered judgment in the court below, and defendants appealed.

The other facts are stated in the opinion of the court.

CHARLES A. TUTTLE, for appellant.

Jo HAMILTON, for respondent.

CURRY, J.

This action was brought to recover damages alleged to have been caused by the defendants in the cutting away of a ditch called the Miners' Ditch, of which certain of the defendants were the owners, by means of which the waters therefrom were precipitated upon the plaintiff's mining property, causing great injury and damage thereto.

The defendants, after having controverted the material averments of the complaint, alleged in substance, that the Miners' Ditch was located, and the right of way for it was acquired prior to the location of plaintiff's mining claim; and they charged that the plaintiff wrongfully and without the consent of the owners of the ditch had, before the time of the happening of the injury, excavated and washed away the soil from below the ditch up to and under it, so as to destroy the same, whereby the owners of the ditch were compelled to build a flume to carry the water over the place thus destroyed; that after this, the plaintiff continued to wash away the soil, and in consequence of it the earth settled and slid away from the defendants' flume, causing it to sink, when water flowed over into the plaintiff's claim. The defendants also alleged that at the time the injury occurred, and for several days before, there had been an unusually heavy fall of rain, and that to avert the injury threatened by the flood the defendants, McClanahan and Weed, consulted with plaintiff's managing agents, one of whom was jointly interested with the plaintiff, in respect to the propriety of cutting the Miner's Ditch, and that by the consent and with the assistance of such agents, the ditch was cut at a point a few rods distant from the place where the flume had settled, by means whereof the water was turned down the canon there; and the defendants averred that this was done to prevent the total ruin of the plaintiff's claim, and that, if it had not been for the previous excavations of the plaintiff, it would not have been necessary to have cut the ditch. This reference to the matters pleaded is necessary for the purpose of presenting to view the points on which the case as it appears by the record must be decided.

On the trial the plaintiff examined a witness who gave evidence to show that this mining claim was located by certain persons whom he named, before the ditch was constructed. The witness testified that he purchased the claim of those who

first located it, and took possession of it in the fall of 1854, and continued to hold it until he conveyed the same to the plaintiff and others, and that from that time the plaintiff had held it in possession. On his cross examination the witness testified that, when he purchased he received a bill of sale of the claim from his vendors, and that when he conveyed to the plaintiff and others, he executed to them a bill of sale of the property. These facts appearing, the counsel for the defendants moved the court to strike out the testimony of the witness as to his purchase, and also as to his sale and conveyance to plaintiff and others, on the ground that the transfers of the property were in writing, which was the best evidence thereof. The court denied the motion, and the defendants' counsel excepted. This ruling of the court the appellants assign as erroneous.

If the facts sought to be proved by this witness were material, as they seem to have been regarded by the parties and the court, then the bills of sale, which were the best evidence of the transfers, should have been produced. The plaintiff deemed it necessary to connect himself with the right and title acquired by the original locators of his mining claim, and we apprehend it was of some importance, at least, that he should do so. But, to do this, it was necessary for him to produce the conveyances or bills of sale, the existence of which was proved. The court ought to have ordered the parol evidence of the sales and conveyances stricken out, when the application to that end was made.

O. J. Stone was examined as a witness upon the trial, and testified that he and the plaintiff were jointly the owners of the property injured by the opening of the ditch—the plaintiff's interest being seven twelfths and that of the witness the remaining five twelfths. The defendants' counsel then offered to prove by him that before the ditch was cut he consented to it. The evidence was objected to on the ground that it was irrelevant, and inadmissible on the cross-examination, and the objection was sustained, and the defendants excepted. When the plaintiff had rested his case, the defendants called the witness Stone on their own behalf, and proposed to prove by him that two days before the ditch was cut he told the defendant McClanahan "that the flume on the

ditch would probably settle, and then to cut the ditch at the canon where the ditch crosses it." The plaintiff objected to the testimony as irrelevant, and the court sustained the objection, and the defendants excepted. The appellants also assign this ruling of the court as erroneous.

If the witness had been permitted to testify, we must presume he would have proved the matters suggested by the offer; and from the circumstances proved it is manifest that the direction of the witness to McClanahan, if given, was dictated by a reasonable appreciation of the dangers that were imminent. The witness was interested in the preservation of the property which he and the plaintiff owned in common, and had the right to adopt such means for its protection from injuries by the flood as the exigencies of the time seemed to require. If the defendants, in compliance with his request, opened the ditch, they ought not to be, and can not on any just principle be, rendered liable in damages for the injuries that followed. We think the testimony offered was relevant, and that the court erred by sustaining the objection made thereto.

The judgment is reversed and a new trial ordered.

BRACKEN v. THE RUSHVILLE AND VIENNA GRAVEL ROAD CO.

(27 Indiana, 346. Supreme Court, 1866.)

Grant distinguished from license. An owner of lands along the line of a contemplated road signed a writing giving to the road company a right to dig and take away gravel to build the road. *Held*, a grant made for consideration and not a revocable license.

Appeal from the Rush County Court of Common Pleas.

J. S. REID, R. D. LOGAN and W. CASSIDAY, for appellant.

B. F. CLAYPOOL and L. SEXTON, for appellee.

GREGORY, J.

The appellant sued the appellee for gravel taken from the lands of the former for the construction of the road-bed of the latter. All the questions arising on the pleadings, on the evidence, and on the instructions of the court, turn upon the construction to be given to a written instrument set out in the pleadings, introduced in evidence, and the legal effect of which was determined in the instructions. At the time the appellee was about to commence the construction of its road, the agents of the company procured a number of persons along the line of the proposed road, the plaintiff included, to execute the following writing, to wit:

"We, the undersigned, who own lands along and near to the line of the *Rushville and Vienna Gravel Road Company* do hereby authorize and empower said company, by themselves or their agents, to enter upon our lands, upon either side of the road now leading from *Rushville to Vienna*, anywhere within a mile of said road, and dig up, remove, and take away from said lands so much gravel and earth as the said company may choose, for the construction and completion of their gravel road from *Rushville* to *Vienna*, in *Rush* county, State of *Indiana;* said company to do us as little damage as practicable in carrying out the privileges hereby granted."

If this is a license, revocable at the will of the makers, then the rulings of the court below are erroneous. If, however, it is a grant, then the rulings were right, and the judgment below ought to be affirmed.

The appellee was about to commence the construction of a road in which the public had an interest.

The nature of the improvement was such as to benefit the appellant, by enhancing the value of his lands and affording him facilities for travel not before possessed. This grant may have induced the appellee to commence the work. If the appellant, and the other makers of the instrument, had refused to make the grant, the enterprise might have been abandoned. We think the writing is a grant, and not a mere license, and therefore not revocable.

The court below committed no error.

The judgment is affirmed with costs.

BLODGETT ET AL. v. THE POTOSI GOLD AND SILVER MINING COMPANY ET AL.

(34 California, 227. Supreme Court, 1867.)

[1] **Transfer by corporate organization and delivery of possession.** Where by the mining customs (in Utah, now State of Nevada) the title to a mining claim may be transferred by delivery of possession without deed, the formation by the locators of a corporation and the placing of such corporation in possession, gives it title to the claim, and suit may be maintained to force it to issue stock to the locators, pursuant to the agreement made at the time it was formed and received possession. And such right may be enforced by those claiming under the original locators by descent.

Appeal from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendants demurred upon the following grounds, to wit:

"Now come the said defendants, the Potosi Gold and Silver Mining Company, John H. Atchison, Lloyd Tevis, and James B. Haggin, by J. P. Hoge and E. D. Wheeler, their attorneys, and demur to the complaint as amended herein, upon the ground that it appears upon the face of the amended complaint:

"First. That the court has no jurisdiction of the persons of the defendants.

"Second. That the court has no jurisdiction of the subject of the action.

"Third. That the plaintiffs have no legal capacity to sue.

"Fourth. That several causes of action have been improperly united, namely, a cause at law with a case in equity.

"Fifth. That the complaint does not state facts sufficient to constitute a cause of action, in this:

"1. That the facts as stated do not authorize the court to grant the relief asked, or any relief in this case.

"2. Because it appears that the lands and mining property in controversy are situated beyond the jurisdiction of this court, in the State of Nevada, and this court has no power or jurisdiction to make any valid decree touching the same, or to pass upon the rights of the parties to such lands, or to

[1] *Table Mt. Co.* v. *Stranahan*, 20 Cal. 198. *Post* LOCATION.

compel the defendants, 'The Potosi Gold and Silver Mining Company,' to accept and receive the said complainants as stockholders in the corporation, or to accept a conveyance from them of such lands under the decree of this court.

"3. The complaint shows no case of fraud, trust, or contract entitling this court to interfere in relation to lands lying beyond the limits of this State, and beyond the jurisdiction of the court, and the court has no authority or jurisdiction to grant any relief or make any valid decree upon the case made in the complaint and upon the facts stated.

"4. That the complaint proceeds upon the inconsistent theories of partnership and of tenancy in common, and no sufficient facts are alleged to entitle the complainants to relief upon either theory.

"5. It appears by said complaint that said Joseph and his six co-locators took up and located said mine as partners, and that said Joseph died, and said partnership was dissolved long before the incorporation of said Potosi Gold and Silver Mining Company, and consequently there was never any agreement, contract, privity, or dealing between said partnership and said corporation.

"6. There are no facts stated in the complaint showing that plaintiffs are entitled to the stock mentioned therein, or to any part thereof, nor that defendants, said corporation, is in any manner bound to recognize plaintiffs or to admit them as members of said corporation; nor does said complaint show any privity whatever, either in fact or in law, between said plaintiffs of their said ancestor and the Potosi Gold and Silver Mining Company."

The court sustained the demurrer, and the plaintiffs declining to amend their complaint, judgment final was rendered against plaintiffs, who appealed.

PATTERSON, WALLACE & STOW, for appellants.

E. D. WHEELER and J. P. HOGE, for respondents.

SANDERSON, J.

The complaint states a cause of action, and the demurrer should have been overruled. It shows that certain parties,

seven in number, therein named, in 1860 formed themselves into a mining association, under the style of the Potosi Company, for the purpose of mining for gold and silver in the then Territory of Utah, now State of Nevada, and to that end they made claim to and took possession of one thousand and four hundred feet of a certain ledge, with its dips, angles and spurs, there situated, in accordance with the usage and custom which prevailed in that locality, whereby they each became vested with the title to an undivided interest of two hundred feet. That the interests so acquired by them could be sold and conveyed, under the usages and customs then and there existing, by delivery of possession without deed or other instrument in writing. That Joseph Blodgett, one of said parties, subsequently died intestate, and seized and possessed of an undivided interest of two hundred feet, less one eighth thereof, leaving the plaintiffs his heirs at law, who, under the laws then and there in force, took the same by descent in certain proportions. That subsequently the then owners of the mining claim, including the plaintiffs, concluded to erect themselves into a corporation under the laws of the State of California, and take the stock of such corporation in place of their respective interests in the ledge. That this plan was carried out, and the corporation known as the Potosi Gold and Silver Mining Company was created, to which full and exclusive possession of the ledge was given by the then owners, upon the agreement and understanding that the corporation should issue to them respectively its certificates of stock in proportion to their interests in the ledge. That said corporation entered and took possession in pursuance of said understanding, and thereby succeeded to and became vested with the title to said ledge upon the condition and trust aforesaid, and still owns and holds the same. It is then alleged that the corporation has failed and refused, and still does, to issue to the plaintiffs certain certificates of stock to which they are entitled under said agreement, notwithstanding they have repeatedly demanded the same, and appropriate relief is prayed for.

If what is said as to the usages, customs and laws of Utah, and as to the facts of the case, be true, the plaintiffs are entitled to the relief which they seek, beyond all controversy, and

we are at a loss to perceive upon what ground the claim of the respondents, that the complaint does not state a cause of action, can be sustained. The complaint does not show, as claimed by the respondents, that the title to the ledge is still in the original locators or their heirs. On the contrary, it shows that the title is in the corporation. Under the usages and customs alleged to be then and there in force, no deed or conveyance in writing was requisite in order to vest the title in the corporation. A delivery of the possession was all that was requisite. That was done, and the corporation having accepted, the possession became vested with the title to the ledge, and bound to issue its stock to the former owners, in pursuance of the agreement under which it acquired its title.

Judgment reversed and cause remanded for further proceedings.

Mr. Justice RHODES expressed no opinion.

Judgment reversed.

McCURDY v. THE ALPHA G. & S. MINING CO.

(3 Nevada, 27. Supreme Court, 1867.)

Granting clause controls habendum—Court to construe deed. A deed which in its granting clause conveyed to the grantee an interest in certain mining ground between Gold Hill ledge and the Butler Peak croppings, recited in the *habendum* that it was intended to convey an interest in all ledges which the grantor owned which would be reached by the grantee in the continuance of a certain tunnel. It was afterward discovered that the description in the *habendum* would include the Gold Hill ledge. *Held*, that an absolute repugnance existed between the granting clause and the *habendum*, and that the grant would be confined to the natural signification of the granting words. *Held*, also, that it is for the court, and not the jury, to interpret written contracts, and when there is no dispute about facts, there is no question for a jury.

Appeal from the District Court of the First Judicial District.

C. J. HILLYER, for appellant, the Alpha Co.

L. E. BULKELEY, for respondent.

BEATTY, C. J.

This was an action brought to recover 127 feet undivided interest in certain mining ground in Gold Hill. The circumstances on which the claim is founded, and which are necessary to be known to determine the rights of the parties, are as follows:

On the ninth day of July, 1859, certain parties made the following location of a mining claim at Gold Hill:

That we, the undersigned, claim four claims of 1,200 feet, including quartz and surface, commencing at the Reverend Bennett claim, and running north. This claim lies to the right of Gold Hill, U. T. February 27, 1859.

L. S. BOWERS,
F. D. CASTEEL,
JOS. PLATO,
W. KNIGHT.

Recorded July 9, 1859.
T. A. HOUSEWORTH.

Subsequently three of the original locators, together with Joseph Webb, who had become associated with them, entered into the following contract.

ARTICLE OF AGREEMENT.

Joseph Webb, Joseph Plato, F. D. Casteel and L. S. Bowers, with J. H. Mills and P. W. Coppers. Date December 16, 1859. Consideration, 250 feet of ground.

The parties of the second part agree to run a tunnel in a certain mining claim situated above Gold Hill, and joins on Board & Co.'s claim, belonging to the parties of the first part. We, of the second parties, agree to run a tunnel till we strike the ledge. For so doing, we of the first part do convey and relinquish all our right of two hundred and fifty feet of ground in the above mining claims. When the parties of the second part have completed the tunnel to the

ledge, then the tunnel shall become the property of both parties of the first and second part.

As witness our hands this day.

JOHN H. MILLS,
P. W. COPPERS,
Parties of the second part.
JOSEPH WEBB,
L. S. BOWERS,
F. D. CASTEEL,
J. PLATO,
Parties of the first part.

Attest: E. C. MORSE.

Recorded March 25, 1860. Book B, p. 175. G. H. R.

Under this contract Mills & Coppers ran a tunnel for some 300 feet, and claimed that they had struck the ledge. At least Mills, one of the joint contractors, claimed that they had. Coppers denies that he made any such claim. But, be that as it may, the company, after some hesitation, and indeed strenuous objection by some of its members to the claim asserted, accepted the contract as finished, and allowed the 250 feet to Coppers & Mills. Coppers did not hesitate to accept his 125 feet, although he says he did not claim the contract was finished.

After accepting the contract of Coppers & Mills as finished, and after allowing them their 250 feet, the price of the contract, the company, at its own expense, extended the tunnel 100 feet west, making the whole tunnel 400 feet in length.

About this time it began to be supposed that back of the ledge located by Bowers and others in July, 1859, and between that and some croppings called Butler's Peak croppings, which lay up the hill considerably to the west, there might be another or other blind ledges. In order to secure these supposed ledges, the following locations were made in June and August of the year 1860:

CENTRAL COMPANY—*Notice.*—We, the undersigned, members of Gold Hill Tunnel Company, have this day located six claims of two hundred feet each on this supposed blind ledge, lying between the Gold Hill ledge and the back ledge croppings, known as Butler's Peak croppings, and we do each and

all of us claim and hold the same proportion in this ledge that we own and are in possession of in Gold Hill Tunnel Company, commencing at this stake and running north, or northerly, twelve hundred feet.

S. Bowers,
Jos. Plato,
P. W. Coppers,
F. D. Casteel,
Jos. Webb,
J. H. Mills & Co.

Gold Hill, June 22, 1860.
Recorded June 23, 1860.
Chas. E. Olney, Recorder, per Aldrich.

"To all that it may concern: That the Gold Hill Tunnel Company claim twelve hundred feet of each and all ledges in this hill, from the mouth of Gold Hill Tunnel to the back ledge, commencing at Board & Co.'s claims, and run northerly twelve hundred feet.

"Gold Hill, August 14, 1860."

On the thirtieth of April, 1861, certain members of the company entered into a further contract with Coppers & McCurdy, the present plaintiffs, to make a still further exploration of their claims. This contract was embodied in the deeds of the members of the mining company, each member making a deed for his proportionate interest of the claim, which was to pass upon the completion of the contract by Coppers & McCurdy. We copy from one of the deeds (they were all alike in form) the material part, upon the proper interpretation of which this whole case depends:

"An undivided twenty-five (25) feet of the interest of the said party of the first part in and to the mining ground of the 'Central Company,' located on the twenty-second day of June, 1860, a full description whereof will be found in book F, page three (3), of the mining records of Gold Hill district. The interest herein intended to be conveyed to include also, and carry along with it, an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part, in their continuation of the tunnel of 'The

Gold Hill Tunneling Company'; said continuation commencing at a point four hundred (400) feet in and from the mouth of said tunnel."

At the time this and other similar deeds were made, the tunnel extended already 400 feet into the hillside, running west towards the Butler's Peak croppings. This tunnel runs for the first four hundred feet through various kinds of matter, some of which seem to be admitted by all intelligent witnesses to be *vein matter*. But the opinion of most of the witnesses who claim to be experts is, that whatever of vein matter was passed through in this four hundred feet of the tunnel was mere *tumble rock*, as they term it; that is, that it was merely part of the vein matter which had fallen from the vein and rolled down the hill. That the true vein confined between the regular wall rocks was not found or explored until it was struck in the tunnel by Coppers & McCurdy, at a distance of four hundred and twenty feet from its mouth.

These are all admitted facts, with this exception: that the defendants claim that the true vein within its walls was struck within the first four hundred feet of the tunnel; and that what the plaintiff calls the east wall of the ledge, say four hundred and twenty feet from the mouth of the tunnel, is nothing more than a seam or crack in the ledge.

It is also an admitted fact that there is but one ledge there—at least, but one has ever been discovered or prospected.

With these admitted facts, the question to be determined is, what ground, if any, passed by the deeds of the thirtieth of April, 1861? The granting words of said deed are as follows:

"Do grant, bargain, sell, and convey unto parties of the second part (McCurdy & Coppers) an undivided —— feet of the interest of the said party of the first part in and to the mining grounds of the Central Company, located on the twenty-second day of June, 1860, a full description whereof will be found in Book F, page three, of the Mining Records of Gold Hill district."

Here, there is a distinct reference to the location made on the twenty-second of June, 1860. That location is of 1,200 feet "on this supposed blind ledge, lying between the

Gold Hill ledge and the Back Hill ledge croppings, known as Butler's Peak croppings." The granting words of the deed, then taken in connection with another written paper to which they refer, clearly confine the grant to a ledge or ledges lying between the Gold Hill ledge and the Butler's Peak ledge, and by the most positive implication *exclude* the Gold Hill ledge. But this *granting* clause is followed by an *explanatory* clause, which is in these words:

"The interest herein intended to be conveyed to include also and carry along with it an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part in their continuation of the tunnel of the 'Gold Hill Tunneling Company,' said continuation commencing at a point four hundred (400) feet in from the mouth of the tunnel."

Now, this explanatory clause is entitled to all due weight, and under the liberal rules adopted by the more modern decisions in the interpretation and enforcement of deeds, it might, perhaps, even have the effect of passing title to that which by no possibility could be understood as having been included within the granting clause of the deed. But, before giving such effect to mere explanatory words, it should appear from the instrument, beyond all reasonable doubt, that it was the intent of the parties using the words to give them such effect. Parties usually describe in the *granting* clause of a deed all that they intend to convey. And no court should hold that a party by his deed has conveyed more than is described or referred to in the granting clause, unless forced to that conclusion by language in other portions of the deed which clearly and beyond all reasonable doubt shows an intent on the part of the grantor to part with more property than was described in the granting clause. This explanatory clause, although not strictly the *habendum* of the deed, is somewhat similar to the *habendum*, and it appears to us should be construed in the same way.

In the text of Bac. Abr., vol. 4, page 529, title Grant, we find this language: "That the *habendum* can not pass anything that is not expressly mentioned or contained by implication in the premises of the deed, because the premises be-

ing part of the deed by which the thing is granted, and consequently that make the gift, it follows that the *habendum*, which only limits the certainty and extent of the estate in the thing given, can not increase or multiply the gift."

And in the American note to this part of the text we find these expressions: "It is clear by the current of all the authorities, that an *habendum* may enlarge, expound or qualify, and vary the estate granted in the premises, * * * but it must not contradict or be repugnant to such estate."

Now, as the estate granted in the premises of this deed was *between* the Gold Hill ledge and another ledge, to make the explanatory clause *include* the Gold Hill ledge, would be to make it *include* that which the premises by necessary implication *excluded*. Thus an absolute repugancy is brought about between the granting and explanatory clause of the deed.

But, necessarily there is no such conflict. If we interpret the language used in the granting part of the deed and the explanatory clause, aided by the light of the surrounding circumstances which were known to the contracting parties, all difficulty seems to vanish. The location of the twenty-second of June, 1860, was of a blind or unseen ledge, supposed to be central between two other ledges, the existence of which was known and ascertained, or at least supposed to be known and ascertained. But in August, 1860, which was before this deed was made, another location was made upon the theory or supposition that there might be a number of *blind* ledges between the two known ledges. Now, if there were a number of such ledges, the question might arise which one was the *true central* ledge. They might all be between the two ledges, and yet no one in a position exactly central or equidistant from the two known ledges. Hence, it was eminently proper to explain that all lodes discovered by the contractors between the two known lodes should be held as central lodes, and should pass under the general expression, "mining grounds of the Central Co." But it will be contended that the words, "ledges and lodes * * * which will be worked and prospected by said parties of the second part," are general and comprehensive words, and must include all ledges which are reached and found west of a point 400 feet

west of the mouth of the tunnel. It is true, such is the natural import of those words, and the meaning which would have to be attached to them if their operation was not restricted by other language in the instrument, and their import explained by surrounding circumstances. In the first place, the granting clause, and this clause being in conflict, the granting clause must prevail, unless it is apparent such an interpretation would defeat the intention of the parties. If we look to the circumstances surrounding the parties when the contract was made, it would appear to us altogether probable that they never intended to grant any part of the Gold Hill ledge proper. The grant was for a *blind* ledge or ledges not yet discovered, and the existence of which was problematical. The existence of a Gold Hill ledge seems to have been admitted by all parties. That there was such a ledge, no one seemed to doubt. It is assumed to exist in the location made in June, 1860, and the company had allowed Coppers & Mills 250 feet for striking and prospecting it.

The deed to Coppers & McCurdy seems to have been made upon the supposition that the Gold Hill ledge had been discovered. Upon this hypothesis, and upon no other, can we reconcile the different clauses of the deed.

Now, if the parties did suppose the Gold Hill ledge proper had been reached and prospected before this deed was made, the grantor did not intend to convey any part of said ledge. As the granting words do not include such ledge, and as the probabilities are at least equal that the grantor, in using the explanatory words, had no idea of including any interest in the front ledge, whether the same had or had not been discovered, we feel bound to confine the grant to what is included within the natural signification of the granting words.

The court, and not the jury, must interpret written contracts. It is true, that when it is necessary to ascertain the existence or non-existence of facts to be proved by parol, to enable the court to interpret a contract, and these facts are contested, they must be submitted to a jury. See Parsons on Con., vol. 2, p. 1, *et seq.*, and notes. But in this case there was really no dispute as to the main facts of the case, and admitting all the disputed facts to have been as plaintiff claims,

still the proper interpretation of the instrument would defeat the action.

The court below should have granted the nonsuit asked for by defendants. It is true, the statement of the grounds upon which a nonsuit was asked for are not in such form as would seem most appropriate; but there was an utter failure to show defendants in possession of the ground mentioned in the deeds on which plaintiff founded his right.

The judgment must be reversed. Ordered that the judgment be reversed, and a new trial granted.

UPON REHEARING.

Deed—Interest to be conveyed. The phrase: "The interest herein intended to be conveyed," commented upon and explained.

Idem—Meaning of word "also." The word *also* implies something in addition to what has gone before.

By the court, BEATTY, C. J.

A rehearing was granted in this case, mainly because the point on which it was decided was not discussed in the original argument of the case, and only slightly alluded to in appellants' brief.

On the argument, counsel for respondent made but two points in opposition to the views of the court as expressed in the former opinion. The one, that the clause which the court calls an explanatory clause of the deed is not properly explanatory, but is a clause conveying something in addition to what is conveyed by the preceding sentence. The other is that the word *also* necessarily implies that something is conveyed *in addition* to that described in the preceding sentence, whilst the court treats the second sentence as not conveying anything in addition, but merely *explaining* what was described in the foregoing sentence.

The two sentences read thus: "An undivided twenty-five (25) feet of the interest of said party of the first part in and to the mining ground of the Central Company, located on the twenty-second day of June, 1860, a full description whereof

will be found in Book F, page three (3), of the Mining Records of Gold Hill District.

"*The interest herein intended to be conveyed to include* also *and carry along with it* an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part in their continuation of the tunnel of the 'Gold Hill Tunneling Company,' said continuation commencing at a point four hundred (400) feet in from mouth of said tunnel."

In the latter sentence we have italicised those words which we think clearly show that it was intended as an explanatory sentence. If it had been intended to make a conveyance of lodes not included within the description of the first sentence, but something entirely distinct therefrom and in addition thereto, surely the italicised words would have been left out. Any one not wholly ignorant of the use of the English language, would have seen that the italicised words, instead of helping to express the idea contended for by respondent, were plainly at war with that theory. No one would have used these words to express the intention of making a conveyance of something entirely distinct from that described in the preceding sentence.

The word *also* certainly implies something in addition to what has gone before, and we have given it that signification. The location of June, 1860, was only of "this supposed blind ledge," between two other ledges. Here was only a single ledge between other ledges. The first sentence then only describes a single ledge, but the explanatory words declare in effect that this shall mean *also all* blind ledges between the two outside ledges described in the location of June, 1860.

The former judgment of this court will stand as the judgment in this case.

BROSNAN, J., did not participate in the decisions in this case.

COCHRAN ET AL. V. O'KEEFE ET AL.

(34 California, 554. Supreme Court, 1868.)

New trial—Review. When a motion for a new trial is founded entirely upon alleged errors of law in proceedings of the court below, the Supreme Court will review an order granting or refusing the motion.

Competent grantee—Objection to deed as evidence. A deed or bill of sale to a mining company by its name, *e. g.*: "The Guatemala Mining Company," shows on its face a grantee capable of taking, and an argument against its admission in evidence on the ground that the company was not capable of taking, will not be noticed, if the objection in the settled statement fails to specify the point upon which it rests.

Appeal from the District Court, Tenth Judicial District, Sierra County.

This was an action to recover for alleged trespasses on a water ditch, and interference with its alleged water right, and to enjoin the further continuance of the acts complained of. The trial was by the court without a jury, and plaintiffs had judgment. On the defendants' motion the court below set aside the judgment and granted a new trial. Divers grounds of error were assigned by defendants, but the only one considered by the court in granting a new trial was that the court erred in admitting in evidence a deed from O. H. Gallop to "The Guatemala Company," under the objections of defendants, which were stated as follows, to wit: "That it was void as a conveyance of title to such property as a ditch or water right, because it was not under seal, and because it was not acknowledged, as required by law, and because no foundation was laid for its introduction in evidence as a conveyance of title from Gallop, and because the Guatemala Company, as a company, could not take title by the bill of sale, even if it was free from legal objections." Upon this objection the court below held, in its written opinion delivered on said motion, that the deed was void for want of a grantee named therein capable of taking, and based its order solely on said ground. The deed was not under seal and duly acknowledged. The plaintiffs appealed from the order granting a new trial.

The other facts are stated in the opinion of the court.

VAN CLIEF & COWDEN, for appellants.

JAMES A. JOHNSON, for respondents.

SPRAGUE, J.

This is an appeal from an order of the court below granting the defendants a new trial.

The only ground upon which the order was based, and the only point to which our attention is called by counsel for the respective parties on this appeal, is error of the court, assigned by respondents as one of the grounds of their motion for a new trial, in admitting as evidence for plaintiffs, against objections of defendants, a deed from O. H. Gallop to the Guatemala Mining Company of the undivided half of the water right in controversy.

As appears by the statement on motion for new trial, the plaintiffs during the progress of the trial offered in evidence a deed from O. H. Gallop to the Guatemala Mining Company of the undivided half of the water right in controversy, to which defendants objected, and stated as ground of objection, "that it was void as a conveyance of title to such property as a ditch or water right, because it was not under seal, and because it was not acknowledged, as required by law, and because no foundation was laid for its introduction in evidence as a conveyance of title from Gallop, and because the Guatemala Company, as a company, could not take title by bill of sale, even if it was free from legal objections."

The court below granted the motion for a new trial on the ground that the deed was erroneously admitted in evidence, there being no grantee named therein capable of taking; the deed was void as a conveyance of title, and plaintiffs took nothing by it.

When the motion for a new trial is founded entirely upon alleged errors of law in the proceedings of the court below, and the order granting or refusing a new trial is based solely upon that ground, this court will review such action of the court as in other cases when questions of law, and not matters of discretion, are involved: *O'Brien* v. *Brady*, 23 Cal. 243. In this case the ground of the motion for a new trial was purely a question of law, and the order of the court granting a new trial was based solely on the assigned error in ad-

mitting in evidence the deed above referred to. The only question, therefore, which this court is called upon to decide on this appeal from the order of the court below is, was it error to admit the deed in evidence on behalf of plaintiffs against the objection thereto of defendant, as stated on the trial?

This court can only look to the statement as settled by the court below to determine the character and point of the objection made on the trial to the introduction of proposed evidence. We can not consult the opinion of the judge, in passing upon the motion for a new trial, to discover the real point of objection. The objection relied upon as found in the settled statement in this case "fails to specify the point upon which it rests." As stated, it seems to imply that the point of objection is, that the instrument is void as a conveyance of title to the Guatemala Company, because it is a *bill of sale*, not for want of a grantee named therein capable of taking.

Had the point been specified in the objection when taken on the trial, as stated and assumed by the judge in his opinion granting the motion, plaintiffs might have entirely obviated the objection by preliminary or subsequent evidence. The title of the complaint names the individual plaintiffs as composing the Guatemala Company, and defendants' answer recognizes the plaintiffs named as composing the Guatemala Company.

The deed upon its face is not void for want of a grantee named therein, and the objection as stated does not point to any defect of parties in the instrument, and all and each of the grounds or points of objection are untenable, or too vague and uncertain to entitle them to consideration on motion for a new trial.

To entitle objections to the admission of evidence to notice, "the party should have laid his finger on the point at the time": *Martin* v. *Travers*, 12 Cal. 243.

Order reversed and cause remanded.

RUTLAND MARBLE COMPANY v. RIPLEY.

(10 Wallace, 339. Supreme Court U. S. 1870.)

Partnership—Reservation—Injunction. A contract relating to a marble quarry, by the terms of which B. was to quarry the marble and furnish it for R.'s mill, who was to manufacture it for market, the net proceeds to be equally divided. *Held*, to be a contract of partnership; and that a clause reserving the right in R. to enter and quarry all the marble he might want in case B. failed to fulfill the stipulations in the contract, did not justify R. in making such entry by collusion with strikers who had refused to work for the plaintiff company, the assignee of B., when R. had been supplied with marble as rapidly as the contract called for, and that R. would be restrained by injunction from intruding upon the possession of plaintiff for such cause; but that the injunction should be so construed as to leave his reserved right untrammelled.

Rescission. A contract will not be rescinded because it has become more burdensome in its operation upon one of the parties than was anticipated, nor when the party has an adequate remedy at law will it be rescinded because the other has violated his engagements.

Specific performance—Continuous contract—Mutuality—Remedy at law. A decree for specific performance is not a matter of right, but rests in the sound discretion of the court, and generally will not be made in favor of a party who has himself been in default. Another objection to such decree may be found in the peculiar character of the contract, *e. g.*, the contract being for a perpetual supply of marble. If performance be decreed the cause must remain in court forever, and the court can not superintend the execution of such a decree. Again, there is a want of mutuality, the decree could not be enforced against one of the parties because the contract stipulates that he may abandon it upon one year's notice, and, finally, the right of re-entry reserved in the contract gives a complete legal remedy so that specific performance will not be decreed.

Marble quarry and mill contract construed. The contract in this case *held*, not to prevent the working of the quarry *ad libitum* for the benefit of the owners, nor does it leave in the grantor a corporeal interest in the marble *in situ*.

These were appeals from the Circuit Court for the District of Vermont, in two decrees, one of them on a bill filed by the Rutland Marble Company against a certain Ripley and one Barnes, and the other was a cross-bill filed by the same Ripley against the company just named. The case was this:

On the 22d of January, 1850, the said Ripley and the said Barnes together owned a tract of land in Rutland township, Vermont, containing about 21 acres, in which was a valuable marble quarry. On that day, Ripley by his deed, released

and quitclaimed unto his co-tenant Barnes, in fee simple, the tract of land. This deed contained a reservation to the releasor, his heirs, executors, administrators and assigns, of "the right to enter upon and take possession of the said 21 acres for the purpose of digging, quarrying and carrying away all the marble he or they might want, according to the stipulations and conditions of a contract that day made and concluded between the said Ripley and Barnes, in case the said Barnes, his heirs, executors, administrators and assigns, should refuse or fail on their part to fulfill the conditions and stipulations of the said contract." By the contract referred to, which was made on the same day, Barnes agreed, "for himself, his heirs, executors, administrators and assigns, to quarry marble from the marble quarry, and draw and deliver at the mill of the said Ripley, in Rutland, from the *layers of marble usually denominated the white layers* in said quarry, all the marble that the said Ripley might want to saw, manufacture and sell, in good sound blocks of suitable size, shape and proportion, and to quarry to order, as might be wanted to keep the mill fully supplied at all times; the amount to be not less than 75,000 feet per annum, and for so long a time as the said Ripley, his heirs, executors, administrators and assigns might want." It was also agreed that should Ripley, his heirs, etc., at any future time desire to increase the business, Barnes, his heirs, executors, administrators and assigns should furnish the blocks as aforesaid, to the extent of 150,000 feet per annum of two-inch marble slabs, on receiving one year's notice to that effect. It was also agreed that Ripley, his heirs, etc., or his or their agents, might have the privilege of dividing each lot of blocks, as taken and drawn from the quarry, taking an average share as to quality, size and shape, before any blocks should be taken from the lots by any other person, the first choice always being taken by Ripley, or for his mill. It was also stipulated that Ripley might abandon the contract at any time on giving one year's notice. The contract further stipulated that if Barnes, his heirs, executors, administrators or assigns should fail or refuse to fulfill its conditions, Ripley, his heirs, executors, administrators or assigns, or his or their agents, might enter upon the quarry and the premises attached to and connected with it, and might quarry

and dig, take and carry away, as much marble as they might want; and might have the use of and enjoy all the rights, privileges and appurtenances belonging to or connected with the said quarry, without hindrance or obstruction, or in any way paying for the same, and might keep possession until Barnes, his heirs, executors, administrators or assigns should be ready and willing to fulfill the conditions of the contract on their part; it being also provided that if, after making an entry as aforesaid, Ripley or his heirs, etc., should make an opening, or put the quarry in a better condition for getting out marble, Barnes, his heirs, executors, administrators or assigns, should not re-enter or resume possession until Ripley, his heirs, etc., should have had the benefit of the work done and money expended by them, unless Barnes should make payment for the same.

It was further provided, that Ripley, his heirs, executors, administrators and assigns should receive the marble blocks so delivered at the mill; should saw, trim and prepare them for market; should sell them, advancing from time to time to Barnes, as the blocks should be delivered, twelve cents per foot of two-inch marble, as payment for drawing and quarrying, and retaining from the proceeds of sales of the marble an equal sum per foot as payment for sawing and trimming, retaining also from the proceeds of sales the expense of transportation to market, and all the necessary expenses of doing the business and collecting payment for the marble (not including payment for his own time and labor), and should divide the remainder of the proceeds of sale equally between Barnes and himself as collected. Ripley further agreed to pay Barnes one cent per foot of two-inch marble for drawing and transporting the marble from the quarry to the mill, the payment to be made from his own funds. At the date of this contract, the quarry had been opened at the north end only, though Barnes contemplated making an opening on the south end for two persons named Allen and Adams. The contract contained accordingly still another provision, evidently an alternative, to wit, that if the marble contained in that part of the ledge which Barnes was about to open for Allen and Adams, should prove to be of better quality than the marble from the quarry then opened and

worked upon the land, Barnes should open on the south end of the lot conveyed to him, and furnish Ripley with marble from that place on receiving reasonable notice.

Barnes having thus become the owner in severalty of the land containing the quarry, conveyed it, on the 1st of June, 1854, to sundry persons expressly excepting the right reserved by Ripley in his deed aforesaid, and reserving to himself a right of entry in case his grantees should fail to perform his contract with Ripley. By several mesne conveyances the property became vested in the Rutland Marble Company on the 31st of October, 1863. In all the deeds, including that to the company, the right of entry reserved by Ripley in his conveyance to Barnes, and his rights under the contract, were expressly excepted, and the grantors reserved also a right of entry on the failure of their grantees to comply with the engagements of the contract of January 22, 1850.

Soon after the contract was made, Ripley gave notice that he required his supply of marble under it to be increased from 75,000 to 150,000 feet, and on the 24th of July, 1854, he gave notice that he wanted the whole of his marble quarried from the south end of the ledge, next to the opening of Allen and Adams, according to the contract. On the 22d of August, 1855, he again gave notice that he claimed under his contract of January 22, 1850, to be *forever* thereafter supplied with marble from a proper opening of the ledge for the purpose on the south end of the lot conveyed by his deed to Barnes. Accordingly an opening was made at the south end, necessarily at considerable expense, and he was supplied therefrom for years, until the spring of 1864, and until differences arose which resulted in these suits. Until that opening was made in 1854 or 1855, there was none on the land except the one which had been made at the north end before the contract between Barnes and Ripley was signed.

In the year 1854, while Barnes was still the owner of the land, a modification of the contract was agreed upon between him and Ripley, the particulars of which it is not necessary here to notice. The modification expired by its own limitation on the 1st of February, 1864, leaving the original agreement in full force. As already said, the marble company had, prior to that time, become the owners of the property; and they had

fulfilled, so far as it appeared, the requirements of the modified contract. But very soon after its expiration, if not before, differences arose between them and Ripley, respecting their rights under the agreement. On the 15th of February, 1864, he gave them notice that he claimed a right to divide every lot of blocks at all times thereafter when taken from the quarry, insisting on a right to a first choice; and when this demand was resisted by the marble company it was renewed by Ripley. Differences also arose between the parties respecting Ripley's obligation, under the terms of the contract calling for "layers of marble usually denominated the white layers," to receive certain kinds of marble called brocadilla, having, in a basis essentially white, considerable deposits of blue or green; differences also arose respecting his right to demand payment for unloading at his mill, and respecting his obligation to pay for quarrying and hauling.

In this state of things, on the 5th of April, or within a day or two after it, a strike took place among the workmen at the quarries. On its occurring Ripley advised the company to hold out saying, "that he would aid in whatever way he could; that the workmen had had their way long enough; that the company ought to resist the thing now, and ought to have done it years before." When replied to by the agent of the company, that the difficulty to resistance was in the contract with him about the mill he said, "that the strikes affected his men, and all the men at the mills, and that he would rather wait six months, or even twelve, and have the company get possession of the quarry and manage it as it ought to be managed." Evidence, however, showed that it was observed about the 13th or 16th of April, that Ripley himself was having drills made of the sort used in quarrying, and that he kept persons in ignorance of the purpose for which he meant to use them, and that when told by an agent of the company, whom he had advised to hold out against the strike, "that the men understood he was going to set them to work, and that he was thus helping the strike along as much as any one," his reply was, "that they did not know but he was going to quarry somewhere else; that they did not know where he was making drills to be used." Whether the company had furnished to Ripley all the marble that he had a right to demand under the contract of January 22, 1850,

was one of the matters in controversy. His mills had been enlarged after the date of that contract, so that they could saw 300,000 feet; and so enlarged were, perhaps, not fully supplied at all times. It appeared, however, by the testimony of Ripley himself, and by his cross-bill, that between the 1st of February, 1864, when the already mentioned modification of the contract expired, and the 3d of April (about which time the strike began) the marble company had delivered at Ripley's mill about 26,687 feet of marble. Ripley, it appeared, was in arrears at this time with his payments; and quarrying in the winter, it was proved, is a sort of work which in a latitude so high as that of Vermont, where frost necessarily pervades a quarry, is performed with injury to the quarry worked on.

On the 26th of April, soon after the strike was complete, Ripley, without giving any notice of his intended action, caused an entry to be made upon the entire property, as well the southern opening as the northern. The entry was made about three o'clock in the morning, by Barnes acting for Ripley, and a large number of men were set at work, to the exclusion of the marble company.

The company hereupon filed a bill in the court below, setting forth various alleged pretensions of Ripley, which it said were unfounded; the strike and his complicity with the workmen; that his mill was always sufficiently supplied, etc.; and praying:

That Barnes and Ripley might be enjoined against further unlawful interference with, or occupation of, the then, the complainant's said property;

That the contract might be decreed, rescinded and terminated, or if not, that various questions respecting its construction might be settled by the decree of the court, and that the defendant Ripley might be required to account for the money of the complainant's in his hands.

To this bill answers were put in by the defendants, and a cross-bill was filed by Ripley. The answer of Ripley, more material than Barnes', after a general history of things, denied most of the important allegations of the bill. It admitted, however, the strike, as stated in it, and after saying that he had expressed the opinion that the company should at once have refused all further employment of the laborers

when the men struck, and have employed a new set of men, which he believed might have been done long before April 26th (the date of his entry), he proceeded to answer that the company totally disregarded his said opinions, and wholly neglected, so far as he could learn, to make any arrangement to substitute new laborers or to renew the business of quarrying, and being reliably informed and believing that no arrangement would ever be made with the laborers for their return to work, and the use and possession of the quarries having been to all appearance entirely vacated from the time of the strike (which was April 5th or 6th), he entered.

The cross-bill, after setting forth the same sort of a general history, and an account of the disputes that had arisen, etc., went on to represent that the marble company were working the quarries to an enormous excess over and above the quantity authorized or required by the contract of 1850, or any reasonable or proper expectation of the parties under the same, and were supplying other parties and the trade in general with great quantities of marble taken from the quarries, in violation of the rights of Ripley; that the whole mass and quantity of marble of the kind and description mentioned in the contract contained on the land, was limited and not inexhaustible, and that a continuance by the company in their then present rate of exhaustion and supply of the general market therefrom, would in a short time so exhaust the quarry as to render the performance of the contract of 1850 impossible, whereby he, the defendant Ripley, would be entirely deprived of his beneficial interest in the quarry arising under the contract, and the whole profit and advantages thereof would be absorbed and exhausted by the company. The cross-bill prayed accordingly that the company might be decreed to perform specifically the contract, by furnishing the marble as therein required or deliver up the possession of the quarry and property to the said cross-complainant, free and discharged from all claim, right or title which the said company ever had, or then had, in and to the same; and that in the meantime they be restrained from operating or working the quarry, or selling any marble taken therefrom; that they be decreed to pay such damages as the complainant might have sustained in consequence of their not having supplied

his mill with marble as required by the contracts of 1850 and 1854, and pay the same by a specified day, and that the quarry be held as security therefor, and in default of such payment the company should be foreclosed of all equity of redemption or claim in and to said quarry and property.

The answer to the cross-bill, denying many other allegations, denied, upon belief, that the quarry was likely to be exhausted, at least within a century, by any amount of work within the power of the company to give, or justified by their interests, and it insisted that the contract did not secure to Ripley the exclusive product of the quarry, but that the company had a right to work it for their own benefit independently of the arrangement; and admitting that they were taking from the quarry, and were disposing of more marble than was required to supply Ripley under the contract.

The grounds upon which the marble company rested their prayer, that the contract might be rescinded and canceled were, that Ripley had not performed the duties which it imposed upon him; that though it was, when made, intended to operate for the equal benefit of both parties, it had become, in the lapse of time, with the increased demand for marble, the greatly enhanced cost of production, and the entire change in the character and results of the marble business, grossly unfair and unequal—so much so, indeed, that the defendant's net receipts under it had become more than twelve times as much as those of the complainant's—to *him* yielding a yearly revenue of $40,000; to *them* resulting in a very great loss on the marble supplied, and a return barely sufficient to defray the expenses of executing the contract; an inequality which they alleged was not denied, and was plainly unconscionable; that in addition to this, the contract made the company partners with Ripley, or his successors in title to the mill, whether they would or not; and that if corporations could not enter into partnership, they could not purchase the lands subject to the obligation of becoming partners, and therefore that the contract restrained the alienability of the property.

One of the grounds on which Ripley rested his claim to a decree for specific performance of the contract was a notice from the marble company, given to him on the 18th of June, 1864, that they would maintain that the facts set forth in their

bill amounted *to a permanent breach and violation on his part of the contract authorizing them to treat it as rescinded, and that they therefore rescinded it*, asserting that they had always performed it on their part until it was thus violated and broken by him.

The Circuit Court, after a hearing, granted an injunction in accordance with the prayer of the Rutland Marble Company, restraining the defendants, Ripley and Barnes, from the further occupation or possession of the premises and property described in the bill, and from any interference therewith, and enjoining them against hindering or disturbing the complainants from taking possession of, occupying, and using the same until the further order of the court. But the court refused to decree a rescission and cancellation of the contract itself.

The court also, in effect, decreed a specific performance of the contract as prayed in the cross-bill, and made several decretal orders respecting the manner in which the contract should be performed, but the injunction asked for in the cross-bill was denied.

Among the decretal orders was one, that Ripley should pay over *monthly* to the company its share of the money received by him from the marble business; and there was none, as he by his cross-bill had prayed for, that the court would enjoin the company from selling and disposing of marble taken from the quarry. From the decrees above mentioned and the decretal orders, appeals were taken to this court; Ripley in his appeal, specifying as a second ground for it, the manner in which, as above stated, he was required to account with the company; and as a sixth ground,

"The omission and refusal of the court to enjoin the company from selling or disposing of marble taken from the quarry."

The matters considered by the court, accordingly, were:

I. Upon the bill by the marble company.

1. Whether the case was one for the injunction prayed for by the company against Ripley and Barnes.

2. Whether the case was one for the cancellation of the contract of January 22, 1850.

II. Upon the cross-bill by Ripley.

1. Whether, it being decided that the contract was not to

be canceled, Ripley was entitled to a decree for specific performance of it by the company.

2. Whether the decretal orders above quoted and objected to by Ripley were erroneous.

The case, of which the transcript filled 904 printed pages, was elaborately argued by Messrs. B. R. CURTIS and E. J. PHELPS, for the Rutland Marble Company; and by Messrs. GEORGE F. EDMUNDS and W. M. EVARTS, *contra*.

Mr. Justice STRONG, having stated the case, delivered the opinion of the court.

The first question presented for our consideration is whether the pleadings and proofs exhibited a proper case for an injunction upon the defendants, Ripley and Barnes, against disturbing the complainants in their right to take possession, occupy, and use the property entered upon by the said defendants, and against continuing the occupation, which they had commenced, of the quarries and other property, real and personal, of the company. The solution of this depends upon another question which is, whether the entry made by Ripley, through his agent Barnes, on the 26th day of April, 1864, was lawful under the circumstances in which it was made.

It is to be observed that the contract of January 22, 1850, between Ripley and Barnes was, in a very practical sense, a contract of partnership, and that to Barnes' position under it the complainants have succeeded. By its terms, each of the parties was bound to contribute to a common enterprise. Each had his own duties to perform. Barnes was to furnish the marble needed for the mill, and Ripley was to bestow his own labor and care in manufacturing it for the market and selling it. When this had been accomplished the net proceeds of sale were to be equally divided. Neither of the parties had a right to interfere with the specified duties of the other so long as that other discharged his obligations under the contract. But they had a common interest in the business carried on, quite as truly as if theirs had been an ordinary partnership. Any unauthorized attempt by one to oust the other from the position and rights assigned to him by the contract was, therefore, not only a breach of their agreement, but a fraud upon

the relation they had assumed to each other. Such a wrong it is the province of a court of equity to prevent. A chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner, even when a dissolution of the partnership is not necessarily contemplated: Story's Equity, § 669.

Primâ facie, the entry of Ripley upon the quarry property and the consequent deforcement of the complainants was an invasion of their rights as owners of the land, and as jointly interested with him in the marble business. The burden is upon him, therefore, to show that his entry was justifiable. Has he shown it? Under the reservation in Ripley's deed, and under the contemporaneous agreement, his right to enter existed only in case Barnes, or his successors in the title, should fail or refuse to fulfill the conditions and stipulations of the contract; that is, should fail or refuse to deliver the marble as required by it. A right to enter for any other cause is not claimed. After a careful examination of the evidence we do not find that there has been any such failure on the part of the complainants to deliver marble prior to April 26, 1864, as justified Ripley in entering upon their possession. They were not bound to keep in full supply the mill which he then had. The contract had reference to a supply of the mill, as it was in 1850, when its capacity was less than 150,000 feet per annum. And when afterward he enlarged his mill so that he could saw 300,000 feet, nothing in the contract required Barnes, or his alienees, to keep the enlarged mill supplied. The obligation was only to furnish 150,000 feet per annum, as it might be wanted to supply the old mill. Nor did the contract require that any defined portion of the whole quantity should be delivered at any specified season of the year. Undoubtedly its spirit demanded that the deliveries should be reasonable. But it is in evidence that quarrying marble must be principally in moderate or warm weather, when there is no frost. It is, therefore, a reasonable construction that the parties intended the deliveries should be greatest in the summer and fall. Yet the evidence is that the complainants delivered at his mill, during the months of February, March and April of 1864, more than 26,000 feet, besides other blocks which he refused to receive. In fact a considerably greater quantity was delivered. All this was

between February 1st (when the modification of the contract before mentioned expired) and the 3d of April. This was in excess of a ratable proportion of what the company was bound to quarry and deliver. After the 2d of April there was an interruption of deliveries, caused by a general turn-out of the workmen at the quarries, of which we shall have more to say hereafter. But what is most significant and convincing, that there was no failure on the part of the company, is Ripley's own sworn answer to their bill. It appears from what he himself states in this answer, that the reason for his entry was not that there had been any failure or refusal to supply his mill with marble so far as he had a right to claim it, but that the marble company disregarded his opinions, and he was apprehensive they would not be able to induce the laborers to return to work. It is plain that for such reasons neither the reservation in his deed nor the provisions of the contract gave him any right of entry. His intrusion upon the complainant's possession was, therefore, entirely unjustifiable and a wrong, the continuance of which a court of equity may well restrain.

We are also of opinion that his entry was not made in good faith merely to supply himself with marble. Very soon after the modified contract came to an end, he set up claims, some of which at least had no foundation in the contract. On the 15th of February he gave notice that he claimed a right to divide every lot of blocks, at all times thereafter, when taken from the quarry referred to in his deed and in the contract, insisting upon a right to the first choice; and this, though he had elected forever to take all his marble from the south opening, which he had required to be made under the alternative provision of the contract. This was either claiming inconsistently with his demand for all his marble from that opening, or it was, in effect, requiring the company to take therefrom twice as much as was necessary to supply the 150,000 feet for his mill. When the demand was resisted it was renewed, though without right. Differences of opinion also arose between the parties respecting Ripley's obligation to receive particular kinds of marble, respecting his right to demand payment for unloading it at his mill, and respecting his obligations to pay for quarrying and hauling. We do not enter

now upon any consideration of the inquiry which of the parties was right. It is sufficient to notice that there were differences. It was while they existed, early in April, the strike of the laborers occurred. The evidence establishes beyond any reasonable doubt that Ripley advised the agents of the company to hold out against the strike, and that when told the mill contracts made a difficulty, he said he would rather go without marble six months, or a year, than that the company should submit to the strikers. Yet at this time, when giving this advice and making these professions, he was preparing secretly to make an entry on the property. He was having drills made at least a week or ten days before he made his entry at night, concealing the purpose for which they were made, and his design to enter. When told that he was aiding the strike, as the men understood he was intending to set them at work, he replied, the men did not know but that he was going to quarry somewhere else. Meanwhile he was himself refusing, or at least neglecting to pay what he was bound to pay, at the time when it was due. It is impossible to read the evidence without being convinced that he intended to secure the possession of the property by surprising the complainants, and thereby force them to assent to his demands and his interpretation of the contract. Such being the conclusions to be drawn from the evidence, we can not doubt that the injunction decreed by the Circuit Court was correctly awarded.

It was, however, too broad. It restrained the defendants, Ripley and Barnes, not only from the further occupation or possession of the premises and property described in the bill, and from any interference therewith, but it enjoined them against hindering or disturbing the complainants from taking possession of, occupying and using the same, until the further order of the court. The effect of this is to deny to Ripley the right of entry reserved in his deed, and forbid his exercising it, though the complainants should hereafter wholly refuse to deliver any marble, unless the court by a future order shall allow an entry. This is probably more than was intended. The decree should be modified so as only to enjoin against an entry for any cause heretofore existing, leaving Ripley to enjoy his reserved right, hereafter entirely untrammeled.

We proceed next to inquire whether there is any sufficient reason for decreeing a cancellation of the contract of January 22, 1850, as prayed for by the marble company. This is a call for an exercise of the highest chancery power—a power most frequently exerted in cases of fraud, accident or mistake. The grounds upon which the company rest their claim, that the contract may be decreed to be rescinded and canceled are, that Ripley has not performed the duties which it imposed upon him; that though it was, when made, intended to operate for the equal benefit of both parties, it has become, in the progress of time, oppressive and burdensome to the complainants, or, as they denominate it, unconscionable; that it makes them partners with Ripley, or his successors in title to the mill, whether they will or not; and that, if corporations can not enter into partnership they can not purchase the lands subject to the obligation of becoming partners, and therefore the contract restrains the alienability of the property.

Before proceeding to a consideration of these, it is proper to remark that the agreement is inseparable from the deed for the land made by Ripley to Barnes. They were made at the same time, and they are parts of one arrangement. What is asked, therefore, is, not to rescind an entire contract, but to strike out of it a part which has become onerous to one of the parties. It is clear that the rights secured to Ripley by the agreement were a part of the consideration for his grant of the land, and so it was understood at the time his deed was made. If there were nothing else to show this, it is made apparent by the reservation in the deed of a right of entry to secure the fulfillment of the stipulations of the agreement. But the deed was an executed contract. It conveyed the title to the grantee. If, therefore, the agreement is rescinded by a decree of the court, the consideration of the grant is taken from the vendor after his conveyance has taken effect, and yet his grant is enforced. It is believed that such action by a court of equity is quite unprecedented. It has been ruled that when a party seeking to set aside a conveyance made by him has received part of the consideration, he must return it before a court of equity will cancel the conveyance.[1] That one party to an executory contract, partly exe-

[1] *Miller* v. *Cotten*, 5 Ga. 341; Story's Equity, § 707.

cuted, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled. Certainly it is not in the present case. If the contract has been broken by Ripley, the marble company has an adequate remedy at law. Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now, if it has become unconscionable, that might possibly be a reason why a court should refuse to decree its specific performance; but it has nothing to do with the question whether it should be ordered to be canceled. It is not the province of a court of equity to undo a bargain because it is hard. Nor have the other reasons assigned in support of the complainants' prayer for cancellation any more weight in view of the circumstances of the case. The marble company have, by their own voluntary act, placed themselves in the position they occupy. With a full knowledge of the reservation in Ripley's deed to Barnes, and of the contract, the performance of which the reservation was intended to secure, they purchased the quarries. They purchased expressly subject to the rights guaranteed to Ripley, and they undertook with their grantors to perform the promises Barnes had made, so long as they held the land. At the time when they purchased, the contract had been in operation for years, and they knew its effect. It is fair to presume that the burden of the contract was considered in fixing the price they paid. They are, therefore, not in a condition to ask for its rescission, and the Circuit Court rightly refused to decree a cancellation.

The next question is, whether Ripley, the defendant, was entitled, upon his cross-bill, to a decree against the marble company for a specific performance of the contract. The court below substantially directed such performance, and from that decree the marble company have appealed, and they now urge that the contract, though supposed to be fair and equal when made, has, in the lapse of time and by the operation of unforeseen causes, arising from changed circumstances, become exceedingly unfair, unreasonable, and unconscionable, so that a decree for its specific performance would tend to their oppression and ruin. It may be doubted, however, whether the hardship of the

contract is any greater than must have been contemplated when it was made. It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events. Mr. Fry in his work on Specific Performance, page 116, (and see entire chapter 6,) asserts that "the question of the hardship of a contract is generally to be judged of at the time at which it is entered into; that if it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except when these subsequent events have been, in some way, due to the party who seeks the performance of the contract." Judge STORY, indeed, Equity Jurisprudence, §§ 750, 776, states the rule somewhat differently, and there are some cases that support his statement; but the rule as stated by Mr. Fry must be applicable to contracts that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually.

There are other objections, however, to a decree for a specific performance in this case, which are more serious. Such a decree is not a matter of right. It rests in the sound discretion of the court, and generally it will not be made in favor of a party who has himself been in default. In Story's Equity Jurisprudence, § 736, it is said that "in cases of covenants and other contracts, where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so

seeking relief, or from their nature they have ceased to have any just application on subsequent events, or it is against public policy to enforce them, courts of equity will not interfere." To the same effect are Smith's Principles of Equity, page 220; *Thompson* v. *Tod*, Peters' Circuit Court, 380; *Lewis* v. *Wood*, 4 Howard's Miss. 86, and many other cases. Applying these principles to the case in hand, it would appear that the conduct of the cross-complainant has not been such as to justify the court in decreeing a specific performance, at his suit against the marble company. Without relying upon his alleged unfounded claims set up from time to time, or his alleged refusals or failures to make the payments due from him at the times required by the contract, or his alleged comfort given to the turn out of the workmen, and his advice that the company should resist it, his unlawful and unwarranted entry and ouster of the marble company was such an invasion of the contract as leaves him no standing as a complainant asking for its performance in a court of equity.

Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size or shape or proportion. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court can not superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder: *Ogden* v. *Fossick*, 9 Jurist (N. S.),

238. Many of the difficulties in the way of decreeing specific performance of a contract requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton R. Co.* v. *The Cleaveland and Toledo R. Co.*, 13 Ohio, 544.

Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former: Fry on Specific Performances, § 286.

But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself. In addition to his remedy by suit at law, he has a right of entry and the privilege of supplying himself with marble, as much as he may want, if the owners of the land do not fulfill the conditions and stipulations of the contract. He may take marble without making payment for it, and in case of such entry he may hold possession until the tenants of the fee are ready and willing to carry out the agreement, and until he has been compensated for all his expenditure. This is a remedy more adequate and full than any decree for specific performance could give him, and it renders such interference of a court of equity entirely unnecessary.

For these reasons we are of opinion that the Circuit Court should not have decreed performance in specie of the contract, but should have left the cross-complainant to his action at law, or to the remedy reserved in his deed.

It is true that the marble company, on the 18th of June, 1864, gave notice to Ripley that they would claim that the facts set forth in their bill amounted to a permanent breach

and violation on his part of the contract, authorizing them to treat it as rescinded, and that they therefore rescinded it, asserting that they had always performed it on their part until it was thus violated and broken by him. But this was after his wrongful entry, which certainly relieved them for a time from delivering marble, and the notice in no way interferes with any remedy he may have at law, or with any right he has to enter under the reservation in his deed.

The decree, so far as it orders specific performance, will therefore be reversed, as also decretal orders that direct the mode of performance.

We have thus disposed of all the questions raised by the appeal of the complainants, the Rutland Marble Company, and of most of those raised by the appeal of the defendant, Ripley. Two or three questions remain to be considered. It is sufficient to say, in answer to the second specification of his appeal, that we do not perceive that he was required to pay the company's share of the money received by him from the marble business any more rapidly than the contract giving to it a reasonable construction, demanded.

In the sixth specification, it is averred that the decree is erroneous in that it omits to order and direct that the Rutland Marble Company, their agents, servants and assigns be enjoined from selling or disposing of marble taken from said quarry of said company. Though the appeal is in these broad terms, it is presumed the appellant does not mean to be understood as claiming that the marble company should be enjoined against selling as much marble as the quantity furnished by them for the mill. If this is not so, then the construction he would have given to the contract is that the tenants of the fee must quarry every year 300,000 feet and deliver one half thereof at the mill, leaving the remainder unsold and undisposed of. This is a construction so unreasonable and so at variance with the words of the contract, that it needs only mention to show its inadmissibility. Assuming then it to be meant that the court should have enjoined against a sale of marble from the land greater in quantity than that which was required by the contract to be delivered at the mill, we are of opinion the claim can not be maintained. It has been argued in support of it that the

evidence shows the quarry to be exhaustible within a definite number of years; that the contract contemplated a perpetual supply for the mill, or a supply so long as the marble shall last, while the quarry shall be worked in the manner contemplated and prescribed by it; and hence that taking out marble and disposing of it in greater quantities than the mill requires, with a right of choice of blocks in Ripley, is an invasion of his right.

The argument is faulty in several particulars. It assumes that the contract prescribed a mode of use of the quarries exclusive of any other. Such is not the agreement. It bears upon its face the evidence that supplies of marble to other customers than Ripley's mill was contemplated. There certainly is no express restriction of the quantity which the owners of the land may take out, and restriction upon the absolute rights of ownership in fee is not to be raised by mere implication. When Ripley required, under the last provision of the agreement, all his marble to be furnished from the south opening on the lot, and when, in obedience to his demand, the opening was made by Barnes, it should require unambiguous language to satisfy a court that Barnes, and his successors in the title, were excluded from taking marble from any other opening for the purpose of sale.

The argument also misapprehends the nature of such a right as Ripley's, even though it be conceded that it was intended to provide for a perpetual enjoyment of a marble supply. Neither the contract, nor the reservation in his deed, gave him a corporeal interest in the marble *in situ*. It was not a grant to him of the marble, or a grant of a right to quarry and take it all. If his interest was real in any sense, which may be doubted, it was incorporeal. Of course it was not exclusive of the right of the owners of the land to take marble on their own account *ad libitum*. In *Lord Mountjoy's case*, reported by Godbolt (case 24), by Leonard, 4 Leon. 147, in Coke Littleton, 104; by Moore, 174; and more fully by Anderson, 307—a leading case—the words of the reservation were:

"Provided always, and it is covenanted, granted, concluded and agreed between the said parties to this indenture and the said John Brown and Charles (the grantees), and their

heirs, covenant and grant to and with the said Lord Mountjoy, his heirs and assigns, by these presents in form following, that is to say, that it shall be lawful for the said Lord Mountjoy, his heirs and assigns, at all times hereafter, to have, take and dig in and upon the heath ground of the premises, from time to time, sufficient ores, heath, turves and other necessaries for the making of alum and copperas."

Here was a reservation from grantees and their heirs, to a grantor, his heirs and assigns, quite as large as in the present case. Yet it was held an incorporeal hereditament, and not a grant of an exclusive right. It was likened to a grant of common *sans nombre*, leaving the grantors a right to dig and take ore, though their so doing might exhaust it. *Chetham* v. *Williamson*, 4 East, 469, is another case equally decisive to the same effect. Other decisions asserting the same doctrine are at hand: *Caldwell* v. *Fulton*, 31 Penn. St. 482; *Johnstown Iron Company* v. *Cambria Iron Co.*, 32 Id. 241; *Gloninger* v. *The Franklin Coal Co.*, 55 Id. 9. In all of them the covenants ran with the land. The grants were of undoubted real interests. They contemplated a perpetual supply to the grantees as plainly as it was contemplated in this case. The rights of the grantees were not limited as here to any defined quantity, and yet it was held they did not interfere with the right of the grantors to take ore, coal, etc., from the property out of which the incorporeal interests issued, and to take it without stint. The appeal of the cross-complainant can not therefore be sustained.

Nor, under the circumstances of the case, can the marble company be decreed to account for failures to supply the marble required by the contract to be delivered at the mill, if there have been such failures. Holding, as we do, that there can be no decree for a specific performance, and that Ripley is not entitled to an injunction against selling marble from the quarry, the substantial basis of the defendant's cross-bill fails, and having disturbed the plaintiff's possession wrongfully, and thereby interfered with their power to perform the contract, he is not in a situation to invoke equitable aid. If he has any claim to damages for a breach of the contract, it must be asserted at law, and there his remedy is complete.

It remains only to add, what must now be apparent, that that part of the decree which directed Ripley to pay the taxable costs, except such as accrued from the portion of the complainant's bill which sought to annul the contract, was correct.

Decree reversed, and the cause remitted with directions to enter a decree in accordance with the opinion above given. The costs of the appeals to be divided, and one half be paid by each of the parties.

VERMONT MINING AND QUARRYING CO. ET AL. V. WINDHAM COUNTY BANK ET AL.

(44 Vermont, 489. Supreme Court, 1872.)

Substituting stockholders for corporation. This suit having been brought in the name of a corporation, which the chancellor found, in the progress of the cause, to have no legal existence, the individual stockholders were by amendment made parties. *Held*, a proper exercise of discretion in the court below on that view of the case; but that the corporation did, in fact, exist.

Taking deed before organization. A corporation may take a deed, and the deed will pass title, although incomplete as to its organization, and before officers have been elected.

Irregular corporate action. Where, the stockholders being only three persons, no formal votes were taken by the directors as a board, nor were officers re-elected, and all proceedings were informal, these facts did not cause the corporation to cease to exist nor deprive it of its rights in the premises.

Evidence taken before substitution. Whether testimony taken before new parties are brought in, can be read on the hearing depends on the circumstances, and was properly allowed in this case.

Notice of deed carrying equities. Notice of a deed brought home to its attorney or its cashier is notice to the bank he represents; and notice of a defective deed is notice of its equities and that chancery might reform and enforce it.

Attachment on land defectively conveyed. An attachment on land described in a deed which was invalid for want of sufficient attestation, will not prevail against the right of the grantee therein to have the same reformed.

BILL IN CHANCERY. The bill brought originally by said corporation only, charged that July 15, 1859, at Providence,

R. I., George Kendall, of said Providence, and his wife, Mary E., deeded to said corporation the "Slate Quarry," in the towns of Vernon and Guilford, in Windham county, Vt., for the consideration of $5,000, actually paid to said Kendall; that one person only signed his name as a witness, though the deed was in fact executed in the presence of two witnesses, the laws of Rhode Island requiring but one witness to a deed; that the deed was acknowledged at Providence before a Vermont commissioner July 18, 1859, and recorded in Guilford town clerk's office, August 2, 1859, and in Vernon, August 13, 1859; that said corporation immediately took and held possession of the premises until the happening of the events after stated; that August 23, 1864, the Windham County Bank attached the same premises on a writ against said Kendall, returnable to September term, 1864, of Windham County Court—the *ad damnum* was $10,000; that Kendall not living in the State and no personal notice given, the case was continued, with an order of notice by publication, to April term, 1865; that Kendall died previous to said April term, 1865, and that during that term the Windham County Bank procured Joseph Steen, a stockholder in said bank, to take administration on Kendall's estate, and consent to a judgment in the bank's favor against Kendall, which was accordingly rendered for $10,362 damages and $20.25 costs; that July 20, 1865, the bank, with Steen's consent, took out execution against Kendall's estate, and levied it on the premises in part satisfaction of the judgment. That Silas M. Waite and Tyler L. Johnson are now in possession, claiming to hold under the bank and adversely to said corporation. The orators aver that the bank and its officers, etc., had full notice and knowledge, actual and constructive, of plaintiff's deed, and that it was executed in good faith and a full consideration paid; that the bank and its officers, etc., acted in bad faith from beginning to end, and with intent to defraud the plaintiffs.

The plaintiffs insist that in any event their deed is good in equity as against all persons having notice, actual or constructive, of its execution and contents. The plaintiffs aver that the bank had no valid claim against Kendall at the time of their attachment, nor at the time of judgment; that if the

bank ever had any valid claim, it has been long since paid by other means than by the said levy.

Prayer: That the defendants may be required to surrender possession of the premises to the orators; that the bank release all its title, etc.; that Steen, administrator, be required to execute any release or conveyance which the court may deem necessary to perfect and quiet orator's title; that an account may be taken, etc., and the defendants decreed to pay over the full value of the rents, issues and profits, etc., and for other relief, etc.

The answer of the Windham County Bank alleged that in 1852 the New England Mining and Quarrying Company was duly organized under a charter from this State; bought the premises in question, and commenced the business of quarrying slate, etc., under the superintendence of said Kendall, its financial agent and one of its principal officers.

That Kendall borrowed a large sum of money, at different times, of the bank, as such agent, and gave his notes therefor; that the money was borrowed of the bank in the regular course of banking business, to be used for the purpose of carrying on said quarrying business; that November 1, 1857, Kendall took up the above notes, and gave the bank instead his note of $7,968.23; that the bank postponed collecting the note on the assurances of Kendall that he would soon be able to pay out of the effects of the N. E. M. & Q. Company; that the bank believed that Kendall was good and responsible.

Admits the bringing of the suit; the attachment of the premises; the entry and continuance of the case; the death of Kendall; the appointment of Steen as administrator, by the request of the bank; that he was a stockholder; the rendition of the judgment; the execution and levy as set forth in the bill; denies all frauds, etc.; asserts that the judgment was founded on the note of November 1, 1857; that the same was due and wholly unpaid at the time of the attachment; that the judgment is justly due now, except so far as satisfied by said levy; says that Steen, administrator, before judgment examined the claim of the bank, and became satisfied of its justice and correctness.

Denies all knowledge, notice or information about the plaintiff's deed, its execution, or consideration, except what

appears by the records in the towns of Guilford and Vernon. Insists that the deed, as so recorded, is inoperative to convey the premises to the plaintiffs.

Admits that they took possession under the levy after the time of redemption run out, and hold and claim the premises as their property.

Says, from information and belief, that the New England M. & Q. Company was owing Kendall for the money which he had borrowed of the bank for them, for which the note of November 1, 1857, was given; that he sued that company, got judgment and execution in 1858; sold some personal property thereon, and levied on the premises for the remainder of his judgment, and had it set off to him at the appraisal of $5,000; that after the time of redemption had run out, in 1860, he procured from the legislature of this State a charter for another company, by the name of the Vermont Mining and Quarrying Company; denies that such corporation was ever organized, and denies that the plaintiffs have a right to sue in their corporate name. The defendants, Waite, Johnson and Steen, also filed several answers to the bill.

The answers were traversed, proofs taken, and a hearing had at September term, 1869, before Barrett, chancellor. And thereupon the orators filed a motion for leave to amend said bill, by bringing into the same as orators, George L. Clarke, Peter H. Brown, Royal T. Gladding and David Heaton 2d, all of the city of Providence, in the State of Rhode Island. Upon which motion the chancellor made the following order:

"This cause, in the name of Vermont Mining and Quarrying Company as orator, against the defendants, as per the original bill, having come on for hearing upon said bill, and the answers thereto, and replications and proofs, as the same were originally made and filed, was fully heard, and thereupon it was considered and announced by the court that the proofs failed to show that such corporation as is set forth in said original bill as orator therein ever had a legal existence or any such existence as would entitle the court to maintain the suit and grant the relief prayed for in said original bill. Whereupon the solicitor, by whom said bill was brought, and who appeared in behalf of the rights, interests and equities

sought and intended to be asserted and maintained by and under said bill, moved the court as per motion on file, for leave to amend said bill, by bringing into the same as orators the persons whom the evidence tended to show to have been and to be the owners of the capital stock of said supposed corporation, and whom the evidence tended to show to have paid to the said George Kendall, named in said bill, the purchase money for the real estate embraced and described in the deed executed by the said Kendall to the said Vermont Mining and Quarrying Company, for the establishment and rendering effectual of which deed for the conveyance of said real estate, as against the defendants said original bill was brought.

"Whereupon and against the objection of the defendants, that the court could not lawfully allow such amendment to be made, the court granted the leave asked by said motion."

And thereupon the plaintiffs amended their bill by inserting at the beginning as orators, "Peter H. Brown, George L. Clarke and Royal T. Gladding, of Providence, in the State of Rhode Island."

And subsequently in the charging part of said bill the words: "And your orators, the said Peter H. Brown, George L. Clarke, Royal T. Gladding, further show that they are the owners of all the capital stock of the Vermont Mining and Quarrying Company, and that they jointly paid the said George Kendall, from their own means, the purchase money for the real estate embraced and described in the deed so executed and delivered by the said George Kendall and Mary E. Kendall to the Vermont Mining and Quarrying Company."

All the defendants jointly answered the amended bill, which answer was traversed.

It appears by the evidence that Judge Keyes drew the deed from Kendall to the complainant corporation, but was not present when it was executed. It also appeared that Kendall told Waite, the cashier of the bank, that he had deeded the land in question to other parties, but did not state their names, and that both Waite and Keyes, the latter being the attorney of the bank, who brought the suit against Kendall, who went to the town clerk's in Guilford, and there saw the record of said defective deed, and noticed that it was witnessed

by but one witness. All this took place before the attachment was made.

The records of the complainant corporation were lost, and its organization, etc., were proved by parol evidence.

At September term, 1870, Barrett, chancellor, the bill was dismissed, *pro forma*, and the orators appealed.

CHARLES N. DAVENPORT, for the orators.

The defendants claim is that of an attaching or levying creditor to secure an antecedent debt. They stand upon their debtor's title. Their levy gives them only such title as their debtor had. If burdened with a trust in favor of orators, they take subject to the burden: *Poor* v. *Woodburn*, 25 Vt. 234. No principle is better settled than that trust property is not subject to attachment or execution upon the private debts of the trustee: *Porter* v. *Bank of Rutland*, 19 Vt. 425; *Williams* v. *Fullerton*, 20 Vt. 346; *Barber* v. *Chapin*, 28 Vt. 413. We learn from the statute what real estate can be taken in execution: "*All houses, lands, and tenements belonging to any person in his own right in fee*," *etc.*: Gen. Stats. 364, § 15. By the very terms of the statute trust property is excluded. It does not belong to the debtor, "*in his own right in fee*": *Hackett* v. *Callendar*, 32 Vt. 97; *Hart et al.* v. *Bank et al.*, 33 Vt. 252; *Elmore* v. *Marks et al.*, 39 Vt. 538. Notice to either Waite, Burrows or Keyes, disclosed by the testimony, would be sufficient: *Porter et al.* v. *Bank et al.*, 19 Vt. 425.

"It may be laid down as a general rule, that a purchaser with notice of a right in another, is, in equity, liable to the same extent and in the same manner as the person from whom he made the purchase": 2 Am. L. Cases in Eq. 135; Sugden on Ven. and Pur. 733; *Miller et al.* v. *R. & W. R. R.*, 36 Vt. 452.

In the leading case of *LeNeve* v. *LeNeve*, 1 Vesey, 64 (S. C. 3 Atk. 646). Lord HARDWICK says:

"The person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled by getting in the legal estate to defeat such prior equitable interest, but will be held a trustee for the person whose right he sought to defeat."

Whatever is sufficient to put a person upon inquiry is good notice, that is, where a man has sufficient information to lead him to a fact, he shall be deemed connusant of that fact: 2 Am. L. Cas. Eq. 138-9. "*If a deed be defective in a statutory requisite, as wanting one witness, it would be regarded as a sufficient contract to convey, which in this State, a court of equity would enforce*, and in other States would be executed under the statute of Henry VIII": *Sherman, Adm'r*, v. *Dodge*, 28 Vt. 31; *French* v. *French*, 3 N. H. 234; *Hart et al.* v. *Bank et al.*, 33 Vt. 252. The proofs show that there is such a corporation, *de facto*, as the Vermont Mining and Quarrying Company. We show a charter, an organization under the charter, officers chosen, by-laws enacted, a common seal, a book of records, certificates of stock issued, the real estate in controversy purchased and paid for, and an attempted conveyance of it to the corporation. This state of facts is sufficient to give the corporation a legal status in court as against the defendants.

Lord v. *Bigelow*, 8 Vt. 445; *Prop. Soc.* v. *Clark*, 4 Peters, 501. An organization *de facto* is sufficient to entitle a corporation to sue and be sued: Abbot's Law of Corp. 566, § 29.

The payment of the consideration by Brown, Clarke and Gladding creates a resulting trust in their favor: Hill on Trustees, 92, and cases cited; *Barron* v. *Barron et al.*, 24 Vt. 375; *Hart et al.* v. *Bank et al.*, 33 Vt. 252.

It was competent for the chancellor to allow orator's solicitor to amend the bill, by bringing in the names of Brown, Clarke and Gladding, as orators: 1 Daniell's Chan. Prac. 454, *et seq.*; *Noyes* v. *Sawyer*, 3 Vt. 160; *Cannon* v. *Slason*, 14 Vt. 183; *Smith* v. *Wainwright*, 24 Vt. 111.

H. E. STOUGHTON, for the defendants. An amendment can not be permitted which changes the parties: *Emerson* v. *Wilson*, 11 Vt. 357. This rule we understand applies to cases in equity: *Milligin* v. *Mitchell*, 1 My. & Cr. 433; Story's Eq. Pl. § 887; Mitford's Pl. 66-7; 385-7-8-9, N. 1; 4 J. C. R. 363.

This amendment makes an entirely new record, and the depositions taken in a cause no longer existing can not be read: Mitford P. 389, N. 1; 13 E. C. L. 496; 3 Atk. 370; 2 El. Ex. R. 124.

This was a private corporation: Com. Sts. P. 83, § 1; Gen. Sts. P. 543, § 2. They were bound to have a clerk who should have the custody of by-laws and records: Gen. Stats. P. 544, § 7. Such clerk to make and keep a record, § 9. The term "clerk" is defined in § 13. It was incumbent upon the corporation to prove its corporate existence: Ang. & A. on Cor. § 635, and this should be done by the records: Ib. § 635; 9 Cow. 205.

Deeds, to be entitled to registration, must be signed and sealed by the party in the presence of two or more witnesses, and acknowledged: Gen. Stats. P. 448, §§ 4, 7; P. 450, § 18. Exception when deed is not acknowledged: P. 449, § 11. This deed was defective, and hence no notice of title to any one: *Hoisington* v. *Hoisington*, 2 Aiken, 235; *Isham, Adm'r*, v. *Bennington Iron Company*, 19 Vt. 230; *Slocum* v. *Catlin et al.*, 22 Vt. 137. The attempt, therefore, to have the deed witnessed after its record, and after the commencement of this suit, and after the death of Kendall, is futile.

The opinion of the court was delivered by PECK, J.

It is objected on the part of the defense that the court of chancery improperly allowed the amendment. As the three orators, let in by the amendment, own the whole stock of the Vermont Mining and Quarrying Company, and as they paid the whole consideration to Kendall for the premises in question, which he conveyed to the corporation, and took the whole stock of the corporation, the order permitting the amendment is but allowing these stockholders to prosecute the same right in their own names, which they commenced to prosecute in the name of the supposed corporation; the court of chancery having failed to find such an organization as to enable the suit to be maintained in the corporate name. It is not a prosecution of a new and distinct right, but the same right under a different name, and in the name of the persons who have all the equitable or beneficial interest, whether the corporation has a technical existence or not. It was within the power of the court of chancery to allow the amendment, in its discretion; and in the view that court took of the evidence as to the organization of the complainant corporation, that discretion was properly exercised.

It is insisted here, as in the court of chancery, on the part of the defense, that the proof does not show an organization of the Vermont Mining and Quarrying Company. The act of incorporation in evidence creates certain persons by name, their associates and successors, a corporation by the name of the Vermont Mining and Quarrying Company, with power, etc. This is sufficient to enable the corporation to take a grant so as to vest in it the title. A corporation may have such an existence by the force of the act of the Legislature creating it, as to give it a capacity to take a grant before it has such an organization and appointment of officers as to enable it to enter upon the transaction of its general business. But we think, in addition to such capacity by the charter, as enabled it to take the title to the premises by the conveyance from Kendall, the proof shows an organization of the corporation, an existing organization that it has not lost. It organized, chose officers, a majority of directors living in this State, a clerk residing in this State, etc., etc., and paid taxes on the premises in question.

Even if in consequence of the stock being substantially all owned by three persons, they did not practice having formal votes of directors acting as a board, and continue to re-elect their officers, but proceeded informally, they did not cease to be a corporation *de facto*, nor thereby lose their right to the premises, upon the facts proved in the case. But whether the equitable interest is in the corporation, or in the three individual orators who own all the stock, is immaterial as to the merits of the case as between the orators and the defendants. These three stockholders paid the $7,200 to Kendall for the premises, and for it took a conveyance of the premises to the corporation, and took certificates of the stock of the corporation. They are the equitable owners, either as equitable beneficiaries by way of a resulting trust, or as stockholders in the corporation.

It is also insisted by the defendant's counsel, that the amendment so changes the record that the evidence taken and filed before the amendment can not be read on the hearing. Whether evidence filed before new parties are added by the amendment can be read on hearing after such amendment, depends on the circumstances of the case and the issues

involved. In this case the issues were substantially the same after the amendment as before, and no new defendants were introduced by the amendment to be affected by testimony taken when they had no opportunity to be present and participate in the examination of the witnesses.

All the defendants had this opportunity, and no reason appears to justify excluding the evidence. It does not appear that any objection was made to the testimony in the court of chancery, but, on the contrary, it is conceded that it was there read without objection, and it is too late to object to it in this court.

It is clearly shown that the bank had notice of the deed from Kendall to the plaintiff corporation before the attachment of the premises by the bank. Notice to Keyes, who made the deed, and who saw the record of it in the town clerk's office, and as attorney for the bank there examined it with a view to bringing a suit for the bank and attaching the land, and levying upon it as the property of Kendall, is sufficient notice to the bank. So in the notice to Waite, proved in the case, he being cashier of the bank and acting for the bank in procuring the attachment to be made, and receiving the notice while acting in that business. It also appears from the deposition of Burrows, that he was a director of the defendant bank at the time the bank attached the premises and made the levy, and that before the attachment by the bank and while he was director, he had notice of the conveyance by Kendall, and that Kendall had received the price of the land. Actual notice to the bank of such defective deed (although defective in having but one witness) was notice of whatever right the grantee might have to a perfect deed from Kendall.

Such defective deed is evidence of an agreement to execute a valid deed; and the proof shows that Kendall was under obligation to the grantee to perfect that deed, and a court of chancery would compel him to do so. Hence the bank, by its attachment and levy, stands in no better condition in respect to title than Kendall did, and is under the same obligation to convey the title and interest acquired by its levy, that rested on Kendall before that levy was made. It is urged that the bank had no notice at the time of its attach-

ment or levy, that Brown, Clarke and Gladding, or either of them, owned any stock in the plaintiff corporation, or that they had any interest in the premises, either as stockholders or otherwise. But it is immaterial whether the bank had any such notice or not. It had notice of the deed on record from Kendall to the Vermont Mining and Quarrying Company, and that is sufficient. It is immaterial whether they knew who the stockholders were or not.

It is claimed by the counsel on the part of the orators, that, as the bank is a levying creditor in virtue of an antecedent debt, and not a purchaser advancing the consideration at the time of the purchase, upon the faith of a good title, the bank would have acquired no title as against the orators, even had the attachment and levy been made without notice to the bank, of the deed to the orators. As we find notice to the bank proved, we have no occasion to express an opinion on this point.

It is claimed by the defendant's counsel, that if the orators have an equity paramount to that of the bank, the bank have a right to redeem. We see no ground on which any such right can rest. The deed executed by Kendall to the orator corporation was not a mortgage; it was not executed to secure a debt; it was an absolute sale. Kendall therefore had no right to redeem, and we have already seen that the bank acquired by its levy no greater right than Kendall had after he executed the deed to the Vermont Mining and Quarrying Company. The bank has no more right to redeem than it would have, had the deed from Kendall been perfect in its execution.

The decree of the court of chancery is reversed, and case remanded to that court with mandate to decree for orators according to the prayer of the bill, with costs.

TAYLOR ET AL. V. HOLTER ET AL.

(1 Montana, 688. Supreme Court, 1872.)

Parol evidence not admissible to vary written instrument. Parol extrinsic proof is not admissible to show that parties who have by deed

conveyed all the water of the right-hand fork of Oro Fino gulch intended to convey the water of the left hand fork. The rule is to give effect to the intention of the parties if the words they employ will admit of it, but nothing can be added to or taken from the written words.

Warranty—Measure of damages—Gold dust. The measure of damages against grantors warranting the title to a ditch and water; *Held*, to be the value at the time of the conveyance, with interest, costs, etc., without regard to the known use which grantees intended to make of the water. *Held*, further, that the consideration in the deed being $2,000 in clean gold dust, only $2,000 in currency could be collected for such consideration.

Warranty in deed of release. A deed in which the grantor remised, released and quitclaimed all that certain water-right lying, etc., as distinguished from the interest of the grantor in the water-right, followed by a covenant of general warranty: *held*, to be a bargain and sale when supported by a full consideration, and that the grantor has warranted the title.

Liability of trustees for personal warranty of title. The grantors in a warranty deed, who held the title as trustees for a third party, to whom the consideration was paid, are liable on their personal covenants in the deed, though they were under no obligation to make a personal covenant of warranty.

Acknowledgment of deed. The acknowledgment to a deed is no part of the deed, and as between the parties to the instrument the deed is good without acknowledgment or record, these being required only for the protection of third parties.

Appeal from the District Court of Lewis and Clarke County, Third Judicial District.

E. W. & J. K. TOOLE and CHUMASERO & CHADWICK, for appellants who were plaintiffs below.

SHOBER & LOWRY and W. F. SANDERS, for respondents.

WADE, C. J.

This is an appeal from a judgment of non-suit in the court below. The suit was brought to recover damages for breach of warranty in a deed from defendants to plaintiffs, conveying a certain water-right situate in Oro Fino gulch, Lewis and Clarke county.

The deed in question is in the words and figures following, to wit:

"This indenture made the fifth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, between Edward M. Hoyt and A. M. Holter, of Helena, Lewis

and Clarke county, Montana Territory, parties of the first part, and Jesse Taylor, Jeremiah Smith and George Cleveland, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of two thousand dollars, clean gulch gold dust, to them in hand paid by said parties of the second part, the receipt whereof is hereby acknowledged, hath remised, released and quitclaimed unto the said parties of the second part, and to their heirs and assigns, all that certain water-right lying and being in the county of Lewis and Clarke, Montana Territory, and bounded and particularly described as follows, to wit: A certain water privilege, the right of which is now vested in us, described as follows: All the water of the right-hand fork of Oro Fino gulch, at and above a point upon said right-hand fork, where the head of a ditch will strike it, which will convey the waters of said right-hand fork of said Oro Fino gulch into a ditch now owned by Taylor, Smith and Cleveland, conveying the waters of the left-hand fork of Oro Fino gulch into Tucker gulch; said point is supposed to be near some cabins about a quarter of a mile above Unionville. The said water-right hereby conveyed, including the right of the said parties of the second part, at any time they may see proper to carry and convey the said water of the said right-hand fork of said Oro Fino gulch to Tucker gulch, or such other gulch or gulches or mining ground as the said parties of the second part may elect to carry the same, to be by them used or disposed of to their sole use and benefit; together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest we now have in said property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, their heirs and assigns forever, and we hereby covenant and agree to warrant and defend the title to the same against all claims of all persons whomsoever, whether in law or equity.

In witness whereof the said parties of the first part hath hereunto set their hands and seals the day and year first above written.

EDWARD M. HOYT, [L. S.]
A. M. HOLTER. [L. S.]

Signed, sealed and delivered in presence of AMOS T. LAIRD.

TERRITORY OF MONTANA,
County of Lewis and Clarke, } ss.

On this 5th day of December, 1868, personally appeared before me, A. B. Babcock, of the aforesaid Territory, Edward M. Hoyt and A. M. Holter, and acknowledged under oath that they and each of them signed and jointly did execute the within instrument, of their own free will.

A. B. BABCOCK,
Notary Public."

Upon the trial of the cause to a jury, the plaintiffs, to maintain the issues on their part, offered the foregoing deed in evidence, and the same was received and read to the jury. It will be seen that this deed is a conveyance of all the waters of the *right-hand fork* of Oro Fino gulch. The plaintiffs then asked the following question of the witness, Taylor, one of the grantees in the deed. "What was intended by the term right-hand fork of Oro Fino gulch?" Which question was objected to, and objection sustained. The plaintiffs then proposed to prove, by competent witnesses, that the plaintiffs became the owners of the right-hand fork of Oro Fino gulch in the year 1866, and were so the owners thereof at the time of the making and execution of the deed from defendants to plaintiffs, on the 5th day of December, 1868; that said plaintiffs at that time were the owners of a ditch conveying the waters of same right-hand fork of Oro Fino gulch into Tucker gulch; that the cabins referred to in said description are situate on the left-hand fork of said gulch, about one fourth of a mile above Unionville, and that immediately after the execution of the deed from defendants to plaintiffs herein set forth, an agent of defendants, the grantors in said deed, delivered to the plaintiffs, the grantees therein, the waters of the

left-hand fork of said Oro Fino gulch, and other testimony of like character. To the introduction of which testimony the defendants objected, which objection was sustained; whereupon plaintiffs submitted to a judgment of nonsuit, and appealed to this court.

The object and purpose of this proof was to show that the grantors intended to convey, and the grantees intended to receive by virtue of the deed in question, the waters of the *left-hand fork* of Oro Fino gulch, instead of the waters of the *right*-hand fork as described in the deed.

This question is presented for solution and decision. Can the words in a deed be altered or changed by extrinsic evidence? In other words, where parties have conveyed all the waters of the *right-hand fork* of a certain gulch or stream, is parol extrinsic proof admissible to show that they intended to convey all the waters of the *left-hand fork* of such stream?

The enunciation of a few general principles, as derived from the books and authorities, may be of use in arriving at a safe and satisfactory answer to the question proposed.

It has long been settled, that where parties have deliberately put their contracts in writing, in such terms as import a legal obligation without uncertainty or ambiguity, as to the object, nature and extent of their agreements, it is conclusively presumed that the whole of the contract was reduced to writing; and all oral testimony as to what was said before, at the time of, or after it is completed, is rejected because it would tend to substitute an oral for a written contract. This rule is not contradicted or varied by the fact, that extrinsic parol evidence is always admissible to give effect to a written instrument, by applying it to its proper subject-matter, by proving the circumstances under which it was made, thereby enabling the court to put itself in the place of the parties with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties.

Instruments are to be interpreted according to their subject-matter, and parol evidence may be resorted to in order to ascertain the nature and qualities of the subject, as a just medium of interpreting the language of the parties, and, also, as a just foundation for giving the instrument an interpretation,

when considered relatively, different from that which it would receive if considered in the abstract.

It is necessary to the validity of a grant that the thing granted should be capable of being distinguished from all other things of the kind, but it is not necessary that the description should be such as to identify the object without the aid of extrinsic testimony, and when the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the description, but to locate the deed upon the land. And this principle was the foundation of the decision in the case of *Donnell* v. *Humphreys*, 1 Mont. 518.

These rules and principles apply to the interpretation of instruments that are ambiguous and uncertain upon their face, as, if I should convey to A my house and lot in Helena, and I was the owner of two houses and lots therein, parol evidence would be admissible to show which of the two houses I intended to convey. But if I conveyed my brick house on Main street, can parol proof be introduced to show that I intended to convey my wooden house on Rodney street?

The description contained in the deed in question is not in any sense ambiguous or uncertain. It is "all the water of the right-hand fork." This is direct, simple and plain. Can we go outside of the deed and create an ambiguity, and then apply the language used to a subject entirely different and directly contradictory to the subject mentioned in the deed?

It is believed that the following is the true rule upon the subject, which rule is gathered from a review of the authorities upon the question, so far as we have been able to read them: The intent of the parties must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances, and so far as possible, the court may put itself in the place of the parties, and may interpret the language from this stand-point, *but nothing can be added to or taken from the written words.*

When it is said that courts may put themselves in the place of the parties, and interpret the language used by the light of surrounding circumstances, it is necessary, in the first place, that such language be ambiguous and uncertain; and in the

next place, no interpretation can be given whereby the language can be altered or changed.

If the language is ambiguous it may be shown what is intended, but this intention, when so shown, shall not contradict, change or vary the language used. The language of the instrument shall be applicable to the intention shown by parol.

If this rule is sustained by the authority, then parol proof never could be introduced to show that a grantor intended to convey the "*left-hand fork*," when he did, in fact, convey the "*right*-hand fork."

One of the leading cases referred to by appellants' counsel is that of *Reamer* v. *Nesmith*, 34 Cal. 624. The description contained in the deed in this case was as follows: "All that certain piece of mining ground situate in Comer's Field, on Swindle Hill, south of the road leading from Yankee Jim's to Todd's Valley, known as the Booth claims, and marked by stakes and corners, four hundred feet front, more or less, *running back into the hill.*"

It will be seen that, although there are many calls in this description, it finally reaches this said claim known as the Booth claims, marked by stakes and corners, and four hundred feet front, more or less, and running back into the hill. And the court say: We are unable to perceive why this description is not applicable to the ground, and sufficiently certain for all purposes of description. But one of the chief questions determined in the case was, whether parol proof was competent to show what was meant by the terms known as the "Booth claims" and "running back into the hill." These terms and phrases are ambiguous and uncertain; and the court very properly say, that it was competent to show the intention of the parties in using these words. But we hold that no intention could be shown that would destroy the words themselves. The words being ambiguous, extrinsic evidence can apply them to their proper subject, and, when so applied, the words must still be applicable to that subject. And although this is true, yet it would not be true that proof could be introduced to show that the parties, when they said the claim known as "Booth's claim" intended John Smith's claim, or when they said "running back to the hills," they

intended to say running forward to the river. The case does not support the proposition that parol extrinsic evidence can be introduced to explain the terms of an unambiguous deed, and to make parties say the "right-hand fork" when they intended the "left-hand fork."

Neither is the proposition supported by the case of *Jackson dem. McNaughton* v. *Loomis*, 18 Johns. 81, where, in a deed, the premises were described as lot No. 51, in the second division of a patent bounded as follows: Beginning at a stake and stones, etc., giving monuments, courses and distances. It was proved that the grantor at the time of the conveyance owned lot No. 50, in the same patent, and that the monuments, courses and distances exactly correspond with those found on the land, and that, unless this was conveyed by the deed it would be inoperative and of no effect. The court held that the words "lot No. 51" might be rejected as surplusage, the description of the premises being sufficiently certain without these words; that if there is a contradiction in a description, that part of it is to be taken which gives most permanence and certainty to the location. This simply decides that where land is described by monuments, courses and distances, these shall control, instead of the number of the lot, and that a false number may be rejected as surplusage. But suppose we undertook to reject the words, "right-hand fork of Oro Fino gulch" in the description under consideration; it can not be done without utterly destroying the deed, unless we supply other words, and no words can be added to or taken from a description by virtue of extrinsic evidence. Strike out the words "right-hand fork," and nothing is conveyed, and the deed is a nullity.

So in the case of *Irwin* v. *The United States*, 16 How. 522, the description contained in the deed was as follows: "The right and privilege to use, divert and carry away from the fountain spring, etc., by which the woolen factory of grantors is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring upon the same level therewith to the factory of said grantors." The court held that, under and by virtue of this description, the grantors were entitled to one half the waters mentioned, and this decision is perfectly con-

sistent with the words used; and, following the words of the description, no other decision could have been arrived at.

The view of the law, as herein intimated, is most forcibly expressed in the case of *Tymason* v. *Bates*, 14 Wend. 672. In this case the court says: "The deed describes the boundaries of the premises conveyed as beginning at the southeast corner of lot number sixty, in the line of *Lindsay* and Roseboom's tract. The existence and location of this line is not in this case the subject of dispute, but the question proposed to be evolved is, whether the parties to the deed meant to refer to what is proved to be the true line, or to another line which they supposed to be the real line of Lindsay and Roseboom's tract, but which in fact was not." And the court proceeded to solve the question by saying that what the parties intended must be ascertained by what is expressed in the deed. If, however, their intention is not expressed in the deed, extrinsic evidence must be resorted to to supply that which the instrument does not supply.

But in the case at bar, the intention is fully and clearly expressed to convey the waters of the right-hand fork of Oro Fino gulch, and, as in the case of *Tymason* v. *Bates*, there is no ambiguity in the expression used, nor any thing in the deed to show that the parties did not mean exactly what they said.

The case under consideration must be distinguished from the numerous cases cited in the books where these were uncertain, contradictory or ambiguous descriptions, wherein it is decided that if there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false or mistake, will not frustrate the grant, but may be rejected as surplusage, and so if the language used is ambiguous it may be explained, but when explained it must verify the intention so proved by extrinsic evidence. The true rule is, *to give effect to the intention of the parties if the words they employ will admit of it.* But if the words used, by their clearness and certainty, absolutely forbid the aid of extrinsic evidence in their interpretation, it would be changing the *certain written contract* of the parties to let in outside parol proof.

Parties must contract for themselves, courts can not make

contracts for them, and the rules of interpretation are utterly unavailing to aid a contract or agreement that is specific and certain in its terms, and clearly speaks what the parties intended it should. If parties convey the right-hand fork of Oro Fino gulch, courts nor witnesses can not say they thereby intended the left-hand fork. As well might they say they intended the left fork of the Missouri river, or the north fork of the Yellowstone, and all the circumstances and surroundings of the parties, however plausible they may appear, can not blot out the language of the deed and supply other language in its place. Such circumstances and surroundings may aid the language but can not destroy it. They can apply the deed to its proper subject, and when thus applied, the language must describe such subject, and be entirely consistent with it. The language must control and not the circumstances. The written words must stand and no parol proof can destroy them.

The proposed testimony, by virtue of the introduction of which it was offered to be proven, that where the parties used the term right-hand fork in the description they in fact intended the left-hand fork, was properly rejected, and the judgment of the court below is affirmed.

And here this decision might properly close, but many questions of grave importance were argued and determined in settling the pleadings in the case, which so vitally affect the rights of the parties herein, that we feel called upon to review those decisions.

And first, the defendants made a motion to strike out certain portions of the complaint, by which motion the question of the measure of damages in a suit for breach of warranty in a deed was presented.

At common law, upon the ancient covenant of warranty, upon voucher or writ of *warrantia chartæ*, the demandant recovered of the vendor other lands of equal value with the lands from which the vendee or feoffee was evicted, and the value was computed as it existed when the warranty was made, and the warrantor was not held to pay for the increased value of the lands. And when the personal covenants of warranty were introduced, this established measure of compensation was not varied or changed.

In this country, upon a covenant of seizin and the right to convey, the rule in all the States seems to be the value of the lands at the time of the conveyance, and interest and costs. I believe this rule usually obtains in the United States wherever the question has been adjudicated, and I do not understand counsel to dispute this proposition. But upon the covenant of warranty and for quiet enjoyment, there is a conflict of authority, upon the measure of and amount of damages that may be recovered for breach of the covenant. In the covenant of seizin the breach occurs at the time of the conveyance, it is broken as soon as it is made, and this is the reason assigned for the rule, that the measure of damages shall be the value of the land at the time of the breach.

In a covenant of warranty or for quiet enjoyment, for they are the same in their legal consequences, the covenant is not broken until eviction, and the effort has been made in such cases to measure the damages by the value of the lands at the time the covenant is broken, in analogy to the rule in covenants of seizin, and hence the question as to the increased value of the land by the natural rise thereof or by way of improvements.

It is difficult to discover any substantial reason why the rule should not be the same in both classes of covenants. These covenants in either case express the contracts, or the intention of the parties, and where the parties act in good faith, it does not look like exact justice to say that A, who takes possession of lands under a covenant of seizin, and makes valuable improvements thereon, upon being dispossessed by the real owner shall receive as damages only the value of the lands, at the time they were conveyed to him and interest, while B, who takes possession under a covenant of warranty, shall receive the value at the time he is evicted. The reason assigned for the difference is a purely technical one, and is arrived at by saying, that in the case of a covenant of seizin the contract is broken as soon as it is made.

We propose to examine the authorities upon the measure of damages in covenants of warranty and for quiet enjoyment, and to arrive at what departures in the rule, if any, have been made as applied to covenants of seizin.

The question came up in the State of New York in 1805,

in the case of *Staats* v. *Ten Eyck*, 3 Cai. 111. The covenants in Ten Eyck's deed were of seizin and for quiet enjoyment, and the question was whether the plaintiff was entitled to recover the value at the time of eviction, or at the time of the purchase and to be ascertained by the consideration given. KENT, C. J., decided that the rule at common law was that the demandant recovered compensation only for the land at the time the warranty was made, and that the law had not been altered since the introduction of personal covenants. LIVINGSTON, J., concurred in this opinion, and without deciding what ought to be the rule where the estate has been improved after purchase, he held that the plaintiff ought to be re-imbursed the costs sustained in the action of ejectment.

In a subsequent case (*Pitcher* v. *Livingston*, 4 Johns. 1), the covenants were of seizin and for quiet enjoyment, and the question was presented whether the plaintiff could recover damages for improvements made by him and the increased value of the land. Upon the question as to the increased value of the land, all the court concurred in the opinion in the case of *Ten Eyck's Executors*, and the majority of the court decided that there could be no recovery for the improvements. SPENCER, J., dissenting therefrom and delivering a dissenting opinion. These decisions have been followed in the State of New York, and in that State the law may be considered settled, and the same rule prevails in the States of Pennsylvania (*Brown* v. *Dickerson*, 12 Penn. St. 372; 4 Dall. 444; 8 Serg. & Rawle, 166); North Carolina (*Phillips* v. *Smith*, 1 N. C. L. R. 475); Georgia (*Davis* v. *Smith*, 5 Ga. 285); Kentucky (2 Bibb, 279); Arkansas (1 Pike, 323); Iowa (1 Greene, 28); Ohio (14 Ohio, 118); Virginia (2 Leigh, 463); Tennessee (4 Humph. 101); New Jersey, (2 Harr. 304); and South Carolina (2 Nott & McCord, 189).

The same rule prevails in the Supreme Court of the United States: *Hopkins* v. *Lee*, 6 Wheat. 118.

Opposed to the rule adopted in these States, and adopting the rule that the measure of damages in the case proposed is the value of the lands with the improvements at the time of the eviction, are the States of Massachusetts (*Gore* v. *Brazier*,

3 Mass. 523); Connecticut (Kirby's R. 3; 14 Conn. 204); Vermont (12 Vt. 387); and Maine (527).

PARSONS, C. J., (in *Gore* v. *Brazier*), said: "When lands are aliened for money, when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that, before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on the real covenant of warranty."

Upon this conflict of authority in the different States we are called upon to determine where the true rule is to be found, and it is our opinion that the weight of authority preponderates in favor of the rule that the measure of damages, where no other consideration intervenes, is the value of the lands at the time the covenant is made, and interest and the necessary costs incurred in defending the title.

The rule we have indicated must prevail where there is nothing in the deed to show a different intention. The contract or covenant of warranty must be construed like any other contract by arriving at the intention of the parties, and where there is anything peculiar in the deed to indicate what the parties intended by their contract, that declared intention ought to prevail over any arbitrary rule of law. If the vendor, at the time of the alienation, knows the particular purpose to which the vendee intends to put the property, he ought to be said to make the conveyance with reference to that purpose.

There are intimations running through all the authorities that the contract of warranty must be construed like any other contract by arriving at the intention of the parties, as if A buys of B a city lot for the purpose of erecting a dwelling-house thereon of great value, and this purpose is known to B at the time he makes the covenant of warranty, he ought to be held to contract with reference to this object, and it would seem that a covenant of warranty of title and quiet enjoyment under such circumstances must be different in its obligation than such a covenant as applied to a piece or parcel of wild land, unoccupied and of little value.

Mr. Sedgwick (Measure of Damages, 164) says: "There seems great doubt whether sufficient attention has been paid to the words of the covenant. What is the meaning of the phrase of 'quiet enjoyment' in regard to a city lot for instance, which is of no use but for buildings, *on which erections must be contemplated at the time of the purchase by both parties*, and of which without such erections no enjoyment can be had? May not a distinction be well taken between this covenant applied to such property and to farming lands?"

It will be observed that this distinction is made by Mr. Sedgwick, where, from the nature of the conveyance and without any words in the deed, the parties must contemplate valuable improvements.

The plaintiffs invoke the distinction made by Mr. Sedgwick, and ask that it be applied to the deed in question. They contend that from the language of the deed itself, aside from the nature of the property conveyed, the vendor knew the purpose of the vendee in securing the conveyance, and knew that he intended to attach valuable improvements thereto, which would be of no value if the title to the property conveyed failed.

From the description in the deed it is true that the vendor knew that the vendee contemplated constructing a ditch whereby the purchase would be made valuable, and the vendor knew that it was necessary to construct a ditch from the right-hand fork to the left-hand fork before this water could be conveyed to Tucker gulch, and he knew that water for Tucker gulch was the object, and he knew that the vendee contemplated making a ditch from the right-hand fork to the left-hand fork, and the vendors fix the point of departure of such ditch. And, if we considered this an open question, we should say that the party having this knowledge must have contracted and entered into his covenant of warranty with reference to this information, and that it formed one of the ingredients of the covenant, and was one of the necessary elements of the contract of warranty. Parties do covenant with reference to the subject-matter of the conveyance and with reference to the object of the conveyance, especially when that object is expressed in the deed. And if we did not feel controlled by the

authorities, we should say that the vendor, knowing the purpose of the vendee, and that purpose being expressed in the deed, he entered into the covenant of warranty with reference to that purpose, and that this covenant would hold him to respond for such improvements. As if A should say to B, "if you will build a flouring mill upon this stream worth $10,000 I will warrant you the title to the water and the water-right," and the mill should be built upon the strength of such warranty, and the title should fail, A should be held for the value of the improvements.

But we feel controlled and guided by a long course of decisions wherein the value of the land at the time of the conveyance, with interest and costs, is fixed as the measure of damages, and the distinction suggested by Mr. Sedgwick, if made at all, has been disregarded. Some definite, fixed and unalterable rule ought to prevail as to the measure of damages upon breach of warranty of title, and the one fixing the value of the lands at the time of the conveyance, with interest and costs, has been a long time adhered to, and it is now too late to make any departure therefrom.

The consideration in the deed is $2,000 in clean gold dust, and the averment in the complaint is that $2,500 in currency was paid as the consideration, and the plaintiffs ask damages for $2,500 as to this item.

Upon this proposition we say that where a contract is made payable in so many dollars' worth of specific articles of personal property, after demand and refusal to deliver the property, it becomes a contract to pay so much in money, and we hold that only $2,000 in currency could have been collected for the consideration in the deeds, and as a consequence only $2,000 damages could be collected in this action, together with interest and costs.

And as to costs, we hold this: that the vendor not only warranted the title, but he promised to defend it. For what shall he respond under this promise to defend the title he grants? That the taxable costs in the suit to defend the title can be recovered under and by virtue of this covenant, does not seem to admit of much question; and that a reasonable counsel fee, as well as the taxable fee of counsel, can be recovered, was held in the case of *Ten Eyck's Executors*, and this seems to

be the rule in Massachusetts, Maine, New Hampshire and Vermont. And the same reason that would authorize the recovery of the clerk's, sheriff's and other costs, would also authorize and permit the recovery of reasonable counsel fees necessarily incurred in defending the title. The character of these expenses is the same. One is just as requisite as the other, and both are requisite to a defense, and we hold that both are recoverable for the same reason.

The next question relates to the sufficiency of the complaint. The defendants filed a demurrer thereto upon the ground that the deed in question was but a release; that the guarantee attached only to the grantors' interest in the property conveyed, and the grantors having no interest in the property at the time of the conveyance, the warranty is therefore void.

An inspection of the deed will show the following: "That the parties of the first part for and in consideration of the sum of $2,000 clean gulch gold dust to them in hand paid, by the parties of the second part, the receipt whereof is hereby acknowledged, hath *remised, released*, and *forever quitclaimed* unto the said parties of the second part, and to their heirs and assigns, all that certain water-right lying," etc. Then follows this clause of warranty: "and we hereby covenant and agree to warrant and defend the title to the same against all claims of all persons whomsoever, whether in law or equity."

By the words used in this deed, did the grantors convey the water-right as upon bargain and sale, or did they simply convey their interest therein, whatever that interest might have been? It is suggested that in the conveyance of a mere possessory title, where the party has not the title in fee, as in this case, that the words *remise, release* and *quitclaim* are the proper words to use in making such conveyance, but we wish to strip this question of every peculiar or local consideration, and to determine it upon the bare words used in the conveyance.

This deed must be taken as a whole and construed together, and every part and portion thereof must be made to harmonize with the whole, and effect must be given to every part, if possible, without violating any known rules of construction and interpretation. We must gather the intention of the par-

ties from the whole deed. We can not single out the words *remise*, *release* and *quitclaim*, and say therefrom that the grantors simply intended to convey their interest in the property, but these words must be construed in the light of the fact that an ample and full consideration was paid for the property, and that the title thereto was warranted. The warranty and the consideration paid are entirely inconsistent with the theory that the grantors intended simply to release the property, but on the contrary they indicate conclusively that the grantors intended to convey the property itself and the title thereto. And this view of the case is supported by a pure principle of equity, which would forever prohibit a party from receiving a full consideration for property, covenanting to warrant the title and still retaining the consideration, to declare that because he had conveyed *nothing* his covenant of warranty was worthless.

We have no hesitation in saying from this deed, that the grantors intended by it to convey the whole property therein described, and that when they received $2,000 therefor they supposed they were receiving the full price and value of such property, and this intention of the parties must be carried into effect if the words they use do not absolutely prohibit.

It will be noticed that the grantors do not remise, release and quitclaim all their right, title and interest in and to the property, but they remise, release and quitclaim *the thing itself*. There is a marked distinction between remising and releasing one's interest in property, and in remising and releasing the property itself; in the latter case, the words, when supported by a full consideration, would be treated as words of bargain and sale, but in the former case the words would only convey the parties' interest, no matter what the consideration was. As if A should remise, release and quitclaim black acre to B, receiving from B the full value of the property, such conveyance would carry the absolute title, while if A should only remise, release and quitclaim his interest in black acre, B would only acquire such interest, although a full consideration was paid. We believe this distinction is supported by the authorities.

In *Lynch* v. *Livingston*, 6 N. Y. 434, the words in the conveyance were "have remised, released and forever quitclaimed,

and by these presents do remise, release and quitclaim unto the said party of the second part," and the court of appeals say, "This was a good and valid bargain and sale. The *pecuniary consideration was adequate to support it as such*, and the words 'remise, release and quitclaim' were sufficient to raise a use in favor of Robert J. Livingston, the bargainee, which use the statute of uses transformed into possession."

In a case reported in the 11 Ill. 484, the court say, in speaking of a quitclaim deed: "Such a deed is just as effectual for the purpose of transferring real estate as a deed of bargain and sale, and had there been no other words in the deed under consideration, showing an intention on the part of the grantor not to convey the land in question, there can be no doubt that the plaintiff would have been entitled to recover."

And so in *Williamson* v. *Test*, 24 Iowa, 138, the court hold: "And notwithstanding the words 'sell, convey and quitclaim,' in the prior part of the instrument, the subsequent language warranting and defending the premises against the lawful claim of all persons whomsoever, except the United States, would be without meaning, unless construed to hold the grantor, as claimed by plaintiff." See also, *McNear* v. *McComber*, 18 Iowa, 12; *Morrison* v. *Wilson*, 30 Cal. 346; and 5 Conn. 220.

So we say of the deed we are considering; the words warranting and defending the title against the claims of all persons whomsoever, are without meaning, and were simply intended as a fraud and a deception, unless the words *remise*, *release* and *quitclaim* are construed as words of bargain and sale, and in giving these words such a construction we only carry into effect the clear and express intention of the parties.

The defendants contend that the words in the deed amount only to a quitclaim of the grantors' interest in the property, and assuming this to be true, they cite the following authorities to support the proposition that when the deed purports to convey only the grantors' interest in the property the warranty only attaches to the interest of the grantors, viz.: *Sweet* v. *Brown*, 12 Metc. 175; *Kimball* v. *Semple*, 25 Cal. 452; *Gee* v. *Moore*, 14 Id. 472; *Blanchard* v. *Brooks*, 12 Pick. 47; *Powers* v. *Ware*, 2 Id. 458.

If the assumption of the defendants were correct, then

their authorities would be in point; but it is assuming the whole question to say that the words in the deed amount simply to a conveyance of the grantors' interest in the property, and we are satisfied that these words, in the light of the authorities cited, when supported by a full consideration paid and a warranty, are words of bargain and sale, and that the warranty attaches not to the grantors' interest, but to the property itself.

The next question arose upon the third defense set up in the answer. This answer substantially set forth that one Laird was the owner of the property in question, or of an interest therein; that he conveyed the same to defendants to indemnify them against a liability for him; that this liability had terminated and ceased to exist; that plaintiffs applied to Laird to purchase this property, the title to which was in defendants, and did purchase the same, paying the entire consideration therefor to Laird; that Laird then applied to the defendants to make to plaintiffs a deed of the property, which they did, and which is the deed in the complaint set forth, and that all these facts, at the time of making such deed by defendants, were known to plaintiffs.

It will be observed by the averments of the answer that the defendants were in fact trustees of Laird, holding the title for him, and it will be seen that one important element, whereby the deed in question was declared to be good and valid as a warranty deed, is wanting in the answer, viz., a consideration. The consideration passed to Laird; these defendants received nothing; they acted as machines in making the conveyance, and if the deed can not be supported as a deed of bargain and sale without an adequate consideration received *by these defendants*, then it must fail; for as to these defendants, no consideration passed between the parties.

We apprehend that it was entirely immaterial to whom the consideration was paid. The question is, not whether Laird or these defendants received the consideration, but was the value of the property paid for by the plaintiffs? The fact that defendants were trustees for Laird can not affect their liability. They acknowledge that they received $2,000 for the property and covenant to warrant the title, and if they immediately paid the money to Laird, to whom it belonged, that fact would not enable them to defend against their covenant.

Trustees are never under any obligation to make a personal covenant of warranty, but if they volunteer to do so their liability is precisely the same as if they were acting for themselves, and not as trustees.

Upon this subject Mr. Hill (on Trustees, page 790) says: "It has been already observed that trustees can not be required to enter into any personal covenants for title in a conveyance of trust estate, beyond the usual covenant that they have not incumbered. But if they should enter into any such personal covenants, they will be liable in an action at law by the covenantees in case of breach."

In *Greason* v. *Keteltas*, 17 N. Y. 491, the court of appeals holds as follows: "Although parties who act in respect to the property in their hands in the capacity of trustees only, are not ordinarily under any obligation, in executing the duties of their trust, to enter into any personal covenants in relation to the trust property, yet when they voluntarily do so they are not only themselves bound to perform such covenants, but those who succeed to their rights as trustees are also bound, so long as they retain the control of the property to which they relate. See, also, *Sumner* v. *Williams*, 8 Mass. 162.

The facts set out in the third defense of the answer are not sufficient to constitute a legal defense to said action.

The final question relates to the acknowledgment of the deed. The acknowledgment is not in the form prescribed by the statute, and the defendants contend that this irregularity vitiates the deed as between the parties to the instrument.

Our statute provides (section 3, p. 396): "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved in the manner hereinafter provided." Section 6 provides: "No acknowledgment of any conveyance, whereby any real estate is conveyed or may be affected, shall be taken unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by oath or affirmation of a creditable witness."

It is admitted that the acknowledgment to the deed in question does not answer the requirements of the statute.

Does such failure in the acknowledgment vitiate the deed as between the parties thereto?

The object of an acknowledgment, and the record of a deed affecting real estate relates to the rights of third persons.

It is submitted that a deed as between the parties to the instrument is good and valid when signed, sealed and delivered, and the purpose of acknowledgment and record is for the protection of third persons. As between the parties a deed can be enforced without acknowledgment and without record. The acknowledgment is no part of the deed.

In the case of *Wood* v. *Owings*, 1 Cranch, 239, the Supreme Court of the United States holds, in considering a case under the Maryland statutes, which upon the subject of acknowledgment of deeds are similar to ours:

"It is a well established doctrine of the common law that a deed becomes complete when sealed and delivered. It then becomes the act of the person who has executed it, and whatever its operation may be, it is his deed. The very act of living, which puts the paper into the possession of the party for whose benefit it is made, seems to require the construction that it has become his deed. Upon the most mature consideration of the subject, the opinion of the court is, that the words used in the act of Maryland, which have been recited, consider the instrument as a deed although inoperative till acknowledged and enrolled."

Following this decision we hold that the defect in this acknowledgment does not destroy the deed as between the parties thereto, and that as between such parties the deed would be good even without acknowledgment or record.

The questions we have considered in this opinion may be reduced to the following as a statement of the conclusions arrived at:

1. The intent of the parties must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances, and so far as possible the court may put itself in the place of the parties, and may interpret the language from this stand-point, but nothing can be added to or taken from the written words. Therefore no interpretation could be given to a deed whereby the words "Right-

hand fork of Oro Fino gulch" in the description could be made to read "Left-hand fork of Oro Fino gulch." Extrinsic parol evidence can only explain ambiguous and uncertain words and phrases. Words direct, simple and certain can not be explained by parol.

2. The measure of damages for breach of warranty in a deed is the value of the property at the time of the conveyance, together with interest thereon, and the necessary costs and expenses incurred in defending the title, and such costs and expenses include a reasonable counsel fee.

3. The words *remise*, *release* and *quitclaim*, when supported by an adequate consideration and warranty of title, thereby showing the intention of the parties to have been to convey the property itself, and not the grantors' interest therein, are words of bargain and sale, and operate to convey the property described.

4. The grantors being trustees and holding the title for the benefit of third persons, and the consideration having passed to such third persons, does not affect their liability. They are liable on their personal covenants, notwithstanding their character as trustees.

5. The acknowledgment to a deed is no part of the deed, and, as between the parties to the instrument a deed is good without acknowledgment, the acknowledgment and record being required for the protection and benefit of third persons.

The judgment of the court below is affirmed.

Judgment affirmed.

CHESTER EMERY COMPANY v. LUCAS.

(112 Massachusetts, 424. Supreme Court, 1873.)

[1] **Identification of the vein—Emery—Iron ore.** Where there was a grant of the metals and minerals in a certain tract "beginning at the center of the vein of iron ore on the line between, etc.," and in trespass for taking ore there was conflicting evidence as to whether there was any such vein, or whether there was more than one vein, and whether the parties agreed on a line of rocks as marking a supposed vein, and

[1] *Daris* v. *Shepard*, L. R., 1 Ch. App. 410; *Post* FAULT.

whether, if any vein, it was not a vein of emery instead of iron: *Held*, that if there was one vein of iron ore as called for in the deed, parol evidence could not affect the construction of the deed upon the question of boundary. 2. If more than one vein, parol evidence must show which was intended. 3. If it was a vein of emery or a line of rocks it would be a good boundary under the deed, though treated by the parties as a vein of iron ore.

Construction—Grant of ore. A grant to one, and his heirs, of all the iron ore, metals and minerals in a described tract of land, with the right to enter and dig and carry away the ore, etc., the grantor "having one year's notice previous to commencing to dig upon the premises," is a grant of a present estate in fee of the ore, etc., and gives the grantee possession so as to maintain an action against a trespasser who removes the ore, although the grantee had given no previous notice of his intention to dig upon the premises.

The action was originally brought against Heman S. Lucas and Charles Alden. The plaintiff afterward discontinued as against Alden. The declaration was as follows:

"The plaintiff, says the defendants, on the first day of January, A. D. 1870, and from thence on divers times, and continually to the first day of February, A. D. 1872, broke and entered the plaintiff's close [describing it substantially in accordance with the description contained in the deed from Wright to Lucas hereinafter set forth], and took and carried away 50,000 tons of emery and 50,000 tons of iron, and converted the same to their own use." The answer denied each and every of the plaintiff's allegations.

At the trial in the Superior Court before ALLEN, J., the plaintiff claimed title under a warranty deed from Erastus Wright to the defendant, the material portions of which were as follows:

"Know all men by these presents, that I, Erastus Wright, * * in consideration of one hundred dollars paid by Heman S. Lucas, * * do hereby give, grant, sell and convey unto the said Heman S. Lucas, his heirs and assigns, all the iron ore, metals and minerals in and upon the following described tract of land, situated in said Chester, and bounded and described as follows, to wit: Beginning at the center of the vein of iron ore on the line between said Wright and Franklin W. Dewey; thence westerly on said line five rods; thence northerly, and parallel with said vein of iron ore, to land

of Jonathan Melvin; thence easterly on said Melvin ten rods; thence southerly and parallel with said vein of iron ore to lands of said Dewey; thence westerly on said Dewey five rods to the first station; estimated to contain about two and one half acres, more or less. Also the right for said grantee, his heirs, assigns, servants and agents, at all times, to enter upon said premises for the purpose of digging and carrying away said ores, metals and minerals, and working in and upon the mine there situated, and to erect and use upon said premises all such buildings and structures as may be necessary or convenient for the purpose of preparing said ores, metals and minerals for the market, together with the right to use said buildings and structures for the purpose of preparing such ores, metals and minerals as may be obtained by the grantee, his heirs and assigns, from tracts of land adjacent to the above described tract, or in the vicinity thereof. Also the right to dig wells upon said premises and conduct the water therefrom, as well as other water that may be found thereon or brought thereto, to such places, and use the same for such purposes, as the grantee, his heirs and assigns, may choose. Also the right for said grantee, his heirs and assigns, servants and agents to pass and repass upon and over any part of said premises in such manner as shall be most convenient for the enjoyment of the rights, privileges and easements above conveyed. Also the right to build and keep in repair all such roads and ways as may be necessary or convenient for the use of the premises for the purposes aforesaid, said Wright to have one year's notice previous to commencing to dig upon said premises. To have and to hold the afore-granted premises, rights, privileges and easements to the said grantee, his heirs and assigns, to their use and behoof forever."

The estate conveyed by this deed, by sundry subsequent conveyances, became vested in the plaintiff, while the fee of the land, subject to the estate conveyed, remained in Erastus Wright till his death, when it descended to his son.

The plaintiff, for the purpose of showing that the defendant had committed the trespass alleged, by removing emery ore from the land described in the deed from Wright to Lucas, introduced evidence tending to show that there was a continuous vein in the rocks, extending from a point some three or

four miles northerly of the place where the defendant dug, to a point on a line between the Dewey lot referred to in the deed and the Wright property, and that the defendant removed emery from the vein in the rocks at a point on the Wright land a few feet from the Dewey line.

The defendant denied that he had taken any emery from the land described in the deed, and introduced evidence tending to show that the Wright lot was originally lot No. 16, in the third division of lots, in the town of Chester, which contained one hundred and one acres, and began at the northeast corner at a small beech tree, and ran thence west one hundred and sixty rods to a beech tree; thence south, ten degrees west, one hundred rods, to a beech tree; thence east one hundred sixty-four rods, to a hemlock tree; thence, northerly, to the corner first mentioned; and that the Dewey lot was carved out of it by the following description: "Beginning at the southeast corner (of the Wright lot); thence north, ten degrees east, sixty-three rods and five tenths of a rod, to a stake and stones; thence west, sixty-three rods and twenty-five hundredths of a rod; thence south, ten degrees west, sixty-three and five tenths rods; thence east, to the first mentioned corner, containing, by estimation, twenty-five acres."

There was evidence tending to show that when Wright's deed to Lucas was made, Lucas and an agent of Wright went over the ground and agreed on certain outcropping rocks in a line extending in a course a little west of north, from the north line of the Dewey lot toward the Melvin lot, as indicating the line of the vein of iron ore intended in the deed, and that Wright assented to their monuments. The lot thus described was not entered by the defendant. The plaintiff claimed that there was no definite fixing on any such monuments as indicating the course of the vein, and claimed that the parcel of land described in the deed was farther west, and included the place of the alleged trespass.

There was evidence tending to show that there was a mine on the Melvin lot a few rods from the Dewey lot; that in this mine there was a vein of iron ore, of a superficial width of several feet, and at the side of this ore, and separated from it by a fringe of rock about one or two inches thick, a vein of emery, that wherever, north of this Melvin mine openings

had been made in what the plaintiff claimed to be the continuous vein, a vein of iron ore was found, and with it a vein of emery, in substantially the same relation to the vein of iron ore as at the Melvin mine; and that in several places other veins of iron ore had been found separate from any emery.

It was in evidence that when the deed from Wright to Lucas was given, Lucas was engaged in getting out iron ore on a contract which he had made to supply a furnace, and knew nothing about the existence of emery in any part of the region, and supposed that all the minerals found were iron. It did not appear that Wright knew anything about the character or location of any vein of iron or any other mineral, and it was shown that he was an old man and did all his business through an agent.

It was in evidence from testimony of the defendant, that when the deed from Wright to him was given, he neither knew nor supposed that there was any vein of iron ore at the place where the acts were done which constituted the alleged trespass.

It was further in evidence that the defendant had opened a mine some two or three hundred feet long, and removed emery therefrom, in a parcel of the Wright lot, lying westerly of the Dewey lot, and extending within some fifty feet of the Dewey west line. It was in evidence that this mine did not contain any vein of iron ore, but only a vein of emery, which was not a material capable of being worked as iron, nor having any commercial value as iron, although in most cases some admixture of iron was found in it.

The evidence was conflicting as to whether the vein which the defendant worked was or was not a continuation of the vein in the rock, which was a vein of iron ore at the Melvin mine. The plaintiff offered evidence tending to show that there was but one vein of ore which was continuous through the mountain, and that the place of the alleged trespass was a part of this vein, and that taken as a whole, it could properly be called a vein of iron ore. The witnesses for the plaintiff, on cross-examination, testified that a vein in which iron did not exist in a form capable of being worked as iron, nor having a commercial value as iron, could not be properly called a vein of iron ore, and the evidence was conflicting as to whether

there was a vein of iron ore at the place of the alleged trespass. There was evidence tending to show that there were veins of ore in the Wright lot other than that vein which the defendant mined. There was evidence tending to show that when the defendant and Wright's agent "went over the ground," before the execution of the Wright deed, they did not go west of the Dewey lot, nor within fifteen or twenty rods of the place where the defendant mined.

There was no evidence that any notice had ever been given by any one claiming under the deed from Wright to Lucas, of an intention or purpose or desire to begin to dig on the land therein described.

The defendant asked the court to rule that if, at the time of making the deed from Wright to Lucas, the outcropping rocks between the north line of the Dewey lot and the south line of the Melvin lot were agreed on as marking the line of the vein of iron ore referred to in the deed, the mining right conveyed by that deed was limited to the land extending five rods each side of the line of those outcropping rocks; whether they, in fact, marked the line of a vein of iron ore or not.

That if, when the deed was made, no visible monuments were agreed on by the parties as marking the territory covered by the deed, it conveyed no right except in a strip of land extending five rods each side of a vein of iron ore; and if there was no vein of iron ore extending from the line of the Dewey lot to the line of the Melvin lot, the deed conveyed nothing.

That if a vein of iron ore were found extending only part of the distance from the Dewey lot to the Melvin lot, such vein would not answer the description, and would not fix the location of the lands described.

That the vein of emery which extended northwesterly from the Dewey lot, was not, within the meaning of the deed, a vein of iron ore; that a vein of iron ore, to satisfy the description in the deed, must be a vein of iron ore containing the iron in such condition as to be fit for working in the furnace, or fit for purposes of commerce or business, as distinguished from a vein of another mineral with some iron mingled with it; that if such a vein existed down to the Melvin mine, and if, across the Wright lot below that mine, the vein or bed of

iron ore did not appear, though a vein in the rock did appear, such vein in the rock without the vein or bed of iron ore was not "the vein of iron ore" within the description in the deed, and did not fix the location of the land described in the deed.

That if one of the parties to the deed erroneously supposed that emery was iron, this would not serve to change the character or effect of the conveyance, unless monuments were pointed out at or about the time of making the deed, as fixing what was agreed on as substantially the line of the vein of iron ore named in the deed.

That if a vein of iron ore existed from the Dewey lot to the Melvin lot, it did not fix the location of the lands in the deed, unless it was either the only vein, or was capable of identification as the particular vein intended by the parties to the deed.

That if it could not be ascertained whether the vein of iron ore extended from the Dewey lot to the Melvin line, or where it ran, if it did so extend, the deed conveyed nothing.

That even if the vein of iron ore were found, and did extend from the line of the Dewey lot to the Melvin line, the deed conveyed only a contingent interest in the mines, to become vested upon the happening of an event, namely, on the giving of notice to Wright of an intention to dig, and the expiration of a year thereafter; or at all events of an intention to begin a year after the giving of the notice; and that this notice not having been given, the plaintiff had no possession or right to the possession of the land, or of the mining right therein, and that the action could not be maintained, because of the want of such interest in and possession of the estate as was necessary to support it.

That even if the deed from Wright to Lucas conveyed the mining right in premises where the defendant's mine was, the defendant, under the deed from Wilcox, had a right to mine there till the plaintiff had perfected his right by giving the notice required by Wright's deed, and the lapse of a year thereafter.

The court did not give the instructions as prayed for, but instructed the jury upon the points covered by the prayer for instructions, in substance, as follows:

That notice as claimed by the defendant was not necessary to entitle the plaintiff to maintain the action:

That the question for the jury was whether the land described in the deeds under which the plaintiff claimed was the land on which the acts were done, which were alleged in the declaration to have been done by the defendant and were admitted by the defendant to have been done by him.

That to find the land described in the deeds, the starting point in the description must be fixed, and the description followed out from that point and located on the land; that if the jury found that there was, in fact, a vein and but one vein of iron ore crossing the line between the Dewey and Wright lots,—that is, a vein which at that point was properly described as a vein of iron ore,—that would fix the starting point, and parol evidence would not be admissible to affect it. If the starting point was proved, could the description be followed out from it, and located on the land? If there was more than one such vein crossing the line from which the land could be located, parol evidence was admissible to show which was intended.

That if there was no such vein of iron ore crossing the line, other questions came up. The first was whether the parties to the deed from Wright to Lucas agreed on certain monuments as determining the location of the vein. If, as contended by the defendant, the parties did agree on certain rocks as marking the location of the vein, from which it was not to vary, that would fix the point, and the line of the vein. But that if the parties did not so agree on the location of the vein, and if there was no vein of iron ore crossing that line, then, if there was a vein of mineral known to the parties, and supposed by them to be a vein of iron ore and to extend across the Wright lot, and if the vein did in fact extend to and cross the line mentioned in the deed, and was the same vein intended by the parties and called in the deed a vein of iron ore, that would be sufficient to fix the starting point, though the vein was in fact at that point a vein of mercury and not of iron ore.

That if, on the whole evidence, the jury found that the defendant removed ore from the land described in the deed from Wright to Lucas, the plaintiff would be entitled to a verdict.

The jury returned a verdict for the plaintiff, and the defendant excepted.

A. L. SOULE, for the defendant.

G. M. STEARNS and M. P. KNOWLTON, for the plaintiff.

COLT, J.

The plaintiff's title to the ores and minerals in question depends upon the point fixed as a starting point in the description given in the deeds under which it claims. That point is described as the "center of the vein of iron ore," on the southerly side of the lot. There was much controversy at the trial as to the existence of any such vein, and as to its true character and extent. Under the instructions given, the jury must have found either (1) that there was in fact such a vein of iron ore crossing the line at the point claimed by the plaintiff and answering the demands of the deed; or (2) if there were more veins than one, that this vein was the one shown by the evidence to have been intended by the parties; or (3) if there was no vein of iron ore, then there was either a line of rocks agreed on as marking the course of a supposed vein, or a vein of other mineral supposed to be iron ore, which was the one intended by the parties and called iron ore in the deed.

It is not shown that the propositions submitted to the jury were not well adapted to, and sufficient to meet, the different aspects of the case, or that there was not evidence enough to warrant a finding for the plaintiff on one or more of them. The instructions asked for, so far as they differ from the instructions given, were properly refused.

In the evidence used at the trial, there is no invasion of the rule that parol evidence is not admissible to control the effect of the deed, and that conveyances of land can only be in writing. For the purpose of locating land conveyed by metes and bounds, resort must always be had to extrinsic evidence; and when uncertainty or ambiguity arises in the application of the description to the subject-matter of the conveyance, evidence of all the facts and circumstances of the transaction will be received for the purpose of ascertaining the real intention

of the parties. The sense in which the parties themselves used the ambiguous terms may be ascertained from their declared intention. Bounds and monuments, which prove to have been indistinctly or inaccurately set out in the deed, may be established by proof that they were recognized as such by the parties. It is only when the terms of the deed, as applied to the land conveyed, create no ambiguity, that evidence of intention is excluded: *Waterman* v. *Johnson*, 13 Pick. 261; *Cook* v. *Babcock*, 7 Cush. 526; *Sargent* v. *Adams*, 3 Gray, 72; *Stoops* v. *Smith*, 100 Mass. 63; *Putnam* v. *Bond*, 100 Mass. 58.

It was further objected that the plaintiff's property in the ores and minerals vested only at the expiration of a year after notice given of an intention to dig. This is not the true construction of the deed. The original owner of the entire estate conveyed to the grantee named, his heirs and assigns, all the iron ore, metals and minerals in and upon the tract described, and in the same deed granted the right to enter and dig upon the described tract, with rights of way, water privileges and other easements required in the preparation and carrying away of the ores and minerals granted; with a further stipulation providing for one year's notice before any digging should commence. This is plainly a grant of an estate in the mines and minerals.

It is well settled that such an estate of freehold may be separated from the general ownership of the soil by an exception in the nature of a reservation out of an estate granted, or by a direct grant. When so separated, it becomes a distinct estate with all the incidents of a fee. It is sometimes difficult to ascertain from the terms used whether a present estate in the mine is created, or only an incorporeal right, in the nature of an easement or *profit a prendre*. There is no such difficulty here. A present estate in the ore, metals and minerals, to the extent of the deposit in and upon the land described, is granted in fee and carved out of the general owner's estate. The stipulation as to notice has reference to the enjoyment of those accessorial rights thought necessary or convenient in order to render available the estate granted. It does not prevent the estate from vesting so as to give possession and a right of action against a mere trespasser to recover the value

of ores or minerals taken away: *Adam* v. *Briggs Iron Co.*, 7 Cush. 361, 367; *White* v. *Foster*, 102 Mass. 375; 7 Bainbridge on Mines (1st ed.), 162.

Exceptions overruled.

THE HARTFORD & SALISBURY ORE CO. v. MILLER.

MILLER v. THE HARTFORD & SALISBURY ORE CO.

(41 Connecticut, 112. Supreme Court of Errors, 1874.)

Trustee, the proper plaintiff in suit on warranty. A deed containing certain covenants of warranty not running with the land, was made to a trustee who afterward released to his *cestui que trust*. *Held*, that the trustee was the proper plaintiff in an action on the covenants; that the fact that the *cestui que trust* furnished the consideration money, did not alter the case, and that whatever was recovered would be followed by the trust.

Deed of co-tenant by metes and bounds, void. The deed of a co-tenant purporting to convey *a portion* of the common estate by *metes and bounds*, is inoperative as against his co-tenants. The same rule applies to a conveyance of ore rights which are real estate.

Rule applied in this case. M. owned the soil of a certain tract in fee, and one undivided seventh interest in the minerals. He conveyed a portion of the tract by metes and bounds and his interest in the ore rights under the particular portion conveyed. *Held*, that such deed was inoperative as against his co-tenants.

Reason of the rule—Defeated by acquiescence. The reason of the rule is the prejudice to the rights of the other co-tenants by so parceling the property. But the co-tenants having acquiesced by releasing to M., all parties are estopped, and the title is confirmed in the purchaser.

Measure of damages. The rule of damages on breach of covenant for seizin is, generally, the consideration money, with interest, if the grantee has taken nothing by his deed; but if by subsequent conveyance the title is perfected in the grantee, he can recover but nominal damages.

[1] **Reformation of mistake in reservation—"Mines" includes more than "minera's."** M. by his deed conveyed the land and one seventh of the ore right with covenant against incumbrances, and with this clause "it being understood that the said Holley heirs own the six sevenths of said ore and minerals." But the ore right of the Holley heirs included also the right to use the surface in mining; and in the executory contract from which the deed had been drawn it was expressed as "six sevenths of the iron ore mines upon said land." The mistake was that of the

[1] *Wilcox* v. *Lucas*, 3 M. R. 380.

scrivener who wrote the deed. *Held*, that the deed should be reformed so as to make this clause read as expressed in the contract.

Action of covenant for breach of the covenants of seizin and against incumbrances in a deed, and a bill in equity by the defendant in that action against the plaintiffs in it, for the reformation of the deed; brought to the Superior Court in Hartford county. The cases involved the same general facts and were referred together to a committee and heard as one case. As most of the questions in the case arise in the action at law, the term plaintiffs will be applied solely to the plaintiffs in that action, and the term defendant to the defendant therein, except where the context shows clearly that a different application is intended. The following facts were reported by the committee:

John M. Holley, formerly of the town of Salisbury in this State, died, the owner of a large estate. After his decease in the year 1836, this estate was regularly settled under his will, and in due course of law distributed to his widow and seven children. A large part of the property was land in Salisbury, amounting to many hundred acres, and of this there was an extensive tract, part of which, being about two hundred and six acres, was distributed in equal undivided thirds to his three daughters, Harriet H. Burrall, wife of William P. Burrall; Mary Ann Lyman, wife of Moses Lyman, Jr., and Sally P. Robbins, wife of Samuel S. Robbins. In the distribution there was prefixed to the distribution of the lands and made a part of the same, the following provision: "It is understood and agreed by the children of the said John M. Holley that all the iron ores which may be found in the land hereinafter distributed shall be owned by them in common, in equal seventh parts, and the distributors have accordingly distributed to each an equal undivided seventh part of any ores that may be found upon any of the following described real estate which has been distributed to said widow and children, with the privilege of ingress and egress to each and all of them for the purpose of digging said ores. It is also understood that if any damage is done to the land distributed to any heirs in searching for, digging or transporting said ore, reasonable damage shall be paid to the owners of said land."

The children referred to in the provision were John M. Holley, George Holley, Alexander H. Holley, Harriet H. Burrall, Mary Ann Lyman and Sally P. Robbins, and Maria Holley, afterward the wife of Edwin B. Williams. Shortly after the distribution and before any of the conveyances hereinafter stated, the interests of the said John and George Holley became vested in the said Alexander Holley, who thereby became the owner of three sevenths of the ore interests referred to.

On the 2d day of April, 1839, William P. and Harriet Burrall, Moses and Mary Ann Lyman, and Samuel S. and Sally P. Robbins, conveyed to Elisha Lee, the above two hundred and six acre tract, the deed containing the following reservation:

"And we, the said grantors, do hereby except from the deed of conveyance of said real estate, and reserve for our own use and benefit and for the use and benefit of our heirs and assigns and for the use and benefit of the other devisees and heirs at law of the said John M. Holley, deceased, and for their heirs and assigns, all of the iron ore in or upon said real estate, and also the right and privilege of entering upon the same with teams, carts and other vehicles, and with laborers, and of searching for, digging and raising said ore, and of transporting the same from said land, and also the right and privilege to the other devisees and heirs at law of said John M. Holley, deceased, and their heirs and assigns, of all their right, interest and estate in or to said ore or regarding the same. It is also understood if any damage is done to the land aforesaid in searching for, digging or transporting said ore, reasonable damage shall be paid to the then owner of said land by the person using said privilege."

The same grantors, under a distinct arrangement on the same day, executed and delivered to said Lee another deed, of which the following is a part: "Know ye that we, etc., for the consideration of two hundred dollars, received to our full satisfaction of Elisha Lee of, etc., do by these presents remise, release, and forever quitclaim unto the said Lee, his heirs and assigns forever, all such right, estate, title and demand whatsoever, as we have or ought to have in or to the one undivided seventh part of all the iron ore in or upon a certain farm of

land lying in Furnace Village in said Salisbury, which farm was distributed jointly to the said Harriet, Sally, and Mary Ann, from the estate of said John M. Holley, deceased, said farm containing about two hundred acres of land, and is the same farm we, the said grantors, have conveyed to said Lee, and is called and known as the Porter farm, and this deed is to convey our title and estate to one seventh part of the iron ore on said farm and no more."

On the 1st day of May, 1843, the said Lee conveyed to James Blodgett a portion of the land conveyed to him by the deed last above described, the portion conveyed being described by metes and bounds, and being about thirty-eight acres less than the whole tract, together with an undivided one seventh of the ore right in the land conveyed, the land being conveyed subject to the six sevenths of the ore right held by the Holley heirs.

On the 2d day of April, 1867, Blodgett conveyed to the defendant a portion of the tract conveyed to him by Lee, the portion conveyed being described by metes and bounds, and being about eighteen acres less than the whole tract that had been conveyed to him, together with an undivided one seventh of the ore right in the land conveyed, the land being conveyed subject to the six sevenths of the ore right held by the Holley heirs.

On the 30th day of October, 1867, the defendant entered into the following written agreement with H. Tudor Brownell, Henry B. Graves and James Hubbard, respecting the farm and ore rights purchased by him of Blodgett:

"This agreement made and entered into this 30th day of October, 1867, by and between Monroe Miller, of the town of Salisbury, party of the first part, and Henry B. Graves, of Litchfield, H. Tudor Brownell, of the city of Hartford, and James Hubbard, of said Salisbury, parties of the second part, witnesseth:

"That the said Miller, in consideration of the agreements and conditions hereinafter set forth, to be performed by the parties of the second part, hereby covenants and agrees to convey by a good and sufficient warranty deed, that certain farm situated in said Salisbury, in or near the village of Lakeville, bounded and described as follows: [describing it]; con-

taining about one hundred and thirty-nine acres, being the same farm that I purchased of James Blodgett about one year ago; also the undivided one seventh part of all the iron ore in and upon said farm, which I own as tenant in common with A. H. Holley and others. But it is understood that said farm is subjected to the interest of said A. H. Holley and others, to the six sevenths of the iron ore mines or minerals, in and upon said farm, and that my conveyance of said farm is subjected to said six sevenths mineral rights; and deliver said deed to the parties of the second part, on or before the first day of April, 1868.

"Now the parties of the second part, in consideration of the foregoing, hereby covenant and agree to pay the said Miller, his heirs and assigns, the sum of twenty-five thousand dollars, in manner as follows, to wit, ten thousand dollars on the first day of April, 1868, on the delivery of said deed to said parties of the second part, and five thousand dollars annually thereafter, on the first day of April in each and every year, until the whole sum of twenty-five thousand dollars shall be fully paid, together with the annual interest; the parties of the second part to secure by mortgage or otherwise the balance due after the payment of said ten thousand dollars.

"And it is further covenanted and agreed by the parties of the second part, that if they shall neglect or fail to pay said sum of ten thousand dollars, on the first day of April next, and secure the payment of the balance of said twenty-five thousand dollars on the delivery of said deed as hereinbefore provided; then the said parties of the second part hereby agree to forfeit and pay to the party of the first part the sum of five thousand dollars. Always provided that if the parties of the second part shall not be able to obtain a lease from said A. H. Holley and the other proprietors of said six sevenths of the said mines or mineral interests in said land, on the terms and stipulations agreed to by and between said A. H. Holley and said Brownell this day, then this agreement shall be null and void, if the parties of the second part shall desire to have it null and void."

On the 12th day of June, 1868, the defendant executed and delivered to Louis H. Bristol, as trustee, a deed of which the following is the material part:

"Know ye that I, Monroe Miller, of the town of Salisbury, Connecticut, for the consideration of twenty-five thousand dollars, received to my full satisfaction of Louis H. Bristol, of the city and county of New Haven, as trustee of and for the sole use and benefit of Hartford and Salisbury Ore Bed Company hereafter to be organized under the joint stock laws of this State, do give, grant, bargain, sell and confirm unto the said Louis H. Bristol, as trustee aforesaid, that certain tract of land situate in said Salisbury, in the village of Lakeville, bounded and described as follows: [describing it]; containing about one hundred and fifty acres; excepting and reserving to myself, my heirs and assigns, the two acre lot lying directly in rear of the new academy, with a convenient right of way to and from the highway aforesaid. And I, the said Miller, do sell and convey the undivided one seventh part of all the iron ore and other minerals in and upon said premises, which I own in common with the heirs and devisees of John M. Holley, deceased. But it is understood that the said Holley heirs own the six sevenths of said ore and minerals."

Subsequently the plaintiffs received a charter, and were incorporated by the General Assembly of this State, and thereupon afterward Bristol, as trustee, on the 26th day of August, 1868, released to the corporation all his interest as trustee under the conveyance last above described. The land described in, and purporting to be conveyed by, the last two deeds, is two acres less than the whole tract purporting to be conveyed by Blodgett's deed to the defendant.

On the 28th of April, 1868, Alexander H. Holley, owning three sevenths of the ore rights mentioned in the distribution, W. P. and Harriet Burrall, Moses and Mary Ann Lyman, Samuel S. and Sally P. Robbins, and Mary Ann Holley, as trustee of Maria Williams (in whom as such trustee, the said Maria's one seventh ore right under the distribution was vested, with power to act in making the following instrument), as party of the first part, made to Brownell, Graves and Hubbard, as party of the second part, a lease of all their interest in the iron ore mine on the land purchased by the lessees of Miller for the term of twenty years, upon certain conditions as to the efficient working of the mine, and upon certain stipulations as to payment of a certain sum per ton for

all the iron ore obtained. The land mentioned in said instrument "as the farm recently owned by the Messrs. Miller, of Lakeville, and being situated in Lakeville," is the same described and purporting to be conveyed in said Blodgett's deed to the defendant.

All the interests of the said Brownell, Graves and Hubbard, under the lease, were soon after assigned to, and have ever since been held by the plaintiffs.

On the 17th day of February, 1871, the plaintiffs made a lease of the property to P. W. Lippitt. Bristol, as trustee, Brownell, Graves and Hubbard, as lessees, the plaintiffs, and Lippitt, their lessee, have had undisturbed possession and enjoyment of the premises purporting to be conveyed and leased to them in accordance with the terms of their respective deeds and leases. The only motive of Brownell, Graves and Hubbard in making their contract of October 30, 1867, with the defendant, and obtaining the defendant's deed to Bristol, as trustee, and of the plaintiffs in obtaining the deed of the trustee to them, was the ore bed, and Miller's supposed ownership of the one seventh of the iron ore, purporting to be conveyed by his deed to the trustee; and the mining of the ore was the object of the plaintiffs' organization.

On the 23d day of September, 1869, Alexander H. Holley executed to James P. Marsh, a bond for a conveyance to him of the three undivided sevenths which he owned in the mine, subject to the lease before described to Brownell, Graves and Hubbard, together with all royalties and rents due or to become due to him under the lease for which Marsh was to pay him $20,000, of which $2,500 was to be paid down and $2,500 by note payable in ten days, and the balance in one, two, and three years, with interest; a deed to be given on payment of the first of the three notes last mentioned, and a mortgage back to secure the remaining notes.

Marsh made the cash payment of $2,500, and the $2,500 note was also paid, or otherwise arranged and settled; but no other payments have ever been made or tendered by him, neither has Holley ever made or tendered to him any deed of the premises, Marsh questioning his title, but insisting on an equity right in the premises under the bond, which was put on record by him in the Salisbury records, October 17, 1870.

Marsh, when he made the contract with Holley, was, and ever since has been, an officer of the plaintiffs' corporation, and has been entrusted with the charge of prosecuting the present suit against Miller.

The land distributed as above to Mrs. Burrall, Mrs. Lyman and Mrs. Robbins, was not the whole of the original Porter farm as conveyed to their father, and included other land not part of the Porter farm; but when the distribution was made, and before the decease of the father, an ore bed had been known and opened and somewhat worked in that part of the Porter farm so distributed in common with other lands to said three daughters, but no ore was then known on other lands of the estate, nor has any ore bed since been found or known to exist on such other lands, although indications of the existence of iron ore in such other lands have been observed. The deeds from Blodgett to Miller, and from Miller to Bristol, each conveyed less of the Porter farm land than was conveyed in the deeds to Blodgett and Miller, respectively, and the ore bed is known to extend into a few acres of land not in the deed of Blodgett to Miller, but previously conveyed by Blodgett to another party. Otherwise, so far as known, the ore bed, so far as in the land of the Holley estate, is in the lands conveyed to Bristol as trustee.

Before executing the contract of October 30, 1867, with Graves, Brownell and Hubbard, and after stating $25,000 as his price for his land and one seventh of the iron ore therein, Miller told the other party that he owned the one seventh of the iron ore in the land, and that the Holley heirs owned the other six sevenths, but that he did not know what the Holley rights were, and wished them to go to the records and look for themselves; and before they executed the contract, Brownell, Graves and Hubbard, or some of them, did examine the Salisbury town records, and told Miller they had done so, and that if they could get a lease of the other six sevenths they could "handle the thing"; and they expressed no dissatisfaction with the Miller title. Bristol, before he took his deed, also examined the town records in reference to Miller's title.

Before the Miller contract was executed, and while the negotiations about it were pending, Brownell went to A. H. Holley and Samuel S. Robbins, who acted for the Holley heirs,

to inquire as to the feasibility of himself and Graves and Hubbard obtaining a lease from them of the six sevenths ore right in the Miller land, and was encouraged to expect this, and on the 28th of April, 1868, they obtained the lease hereinbefore stated.

From the date of the deeds to Lee, the title to one seventh of the iron ore in the successive owners of the lands conveyed to Lee, Blodgett, Miller, Bristol, and the plaintiffs, has been recognized by the Holley heirs, the owners of the other six sevenths, as a valid title, and the same seems not to have been questioned by any one but the plaintiffs, nor by them until on or about the commencement of the present proceedings. Since about 1843, the owners of these lands have been exercising such right as owners of the one seventh, recognized as such by the Holley heirs, and dividing with them the proceeds of mining such ore on that basis, unquestioned by any one. This mining has not been constant until the plaintiffs undertook it, but has been repeatedly undertaken before, at intervals, and in one or two cases continued through quite a period. The plaintiffs, since taking their title to the land, have continued to possess and enjoy the one seventh right by themselves and their tenants; but since some time after taking their title to it from Miller, through Bristol, trustee, they have questioned its validity, as now in these proceedings, although continuing to possess and enjoy the right.

With the purpose of assuring the title of the one seventh to Miller, and so to the plaintiffs—A. H. Holley, Mrs. Burrall, Mrs. Robbins, Mrs. Lyman, and their husbands, and Maria L. Williams and her trustee, Mary Ann Holley, on the 14th day of August, 1873, executed and delivered to Miller a quitclaim deed of all their interest in the one-seventh ore right which the deed of Miller purported to convey to Bristol as trustee, which deed was the next day put on record. When afterward notified of this deed, the plaintiffs refused to take anything under it by operation of law, and so notified the defendant, and tendered to him a reconveyance of whatever rights, by operation of law, the deed of the Holley heirs vested in them, which tender was declined.

On the 6th of September, 1873, the defendant also executed and tendered to the plaintiffs a quitclaim deed of the one

seventh ore right in question, which deed the plaintiffs refused to accept.

When Miller made his contract with Brownell, Graves and Hubbard, and gave his deed to Bristol, trustee, he set no separate valuation on the land and on the one seventh ore right. His price, as stated and closed by him in the contract and deed, was $25,000 for the whole farm and one seventh ore right, together. Brownell, Graves and Hubbard, on their part, estimated the land at $10,000, and the ore right at $15,000, but it did not appear that Miller knew this. Of the $25,000, $15,000 has been paid—$14,000 to Miller and $1,000 on a mortgage given by Miller to Blodgett, which the plaintiffs had assumed to pay as part of the $25,000. There remains $4,900 principal due on the mortgage, with interest, and $5,100, with interest, due to Miller.

The deed to Bristol, trustee, was given by Miller in intended fulfillment of his contract with Brownell, Graves and Hubbard, at the request of these latter, who had not at the time brought about the incorporation of themselves and others, as they had expected and were expecting to do, and as finally accomplished in the incorporation of the plaintiffs. When the incorporation and organization of the plaintiffs under their charter was effected, Bristol, as trustee, at the instance of Brownell, Graves and Hubbard, made his deed to the plaintiffs. The defendant objected to the plaintiffs offering any evidence of the breach of the covenant of seizin and against incumbrances in the deed of Miller to Bristol, as trustee, on the ground that no right to sue in this action for such breaches belonged to the plaintiffs, and the evidence was received subject to the objection.

If, at the time of the execution and delivery of the deed to Bristol, trustee, the defendant under the foregoing facts and deeds was not seized, as in the deed covenanted, of the one seventh of the iron ore in the lands conveyed to him by the deed, the committee found the damage to the plaintiffs by reason of the breach of the covenant, as follows: The land alone, excluding all right in the iron ore therein, was worth, at the time of the contract and deed given, $12,000.

If by law, the difference between that sum and $25,000, the price given to Miller for the land and one seventh of the

iron ore therein, should be held to be the rule of damages, the committee found the damage for the breach of the covenant of seizin to be the sum of $13,000, upon which he allowed no interest, because the plaintiffs had had the benefit of the one seventh ore right to the time of trial. If, however, the committee was at liberty to decide the damage by the evidence of the values offered in connection with the price agreed upon, he was of opinion and found that, when the contract of October 30, 1867, and the deed to Bristol were made, the value of the land and of one seventh of the iron ore therein did not exceed $14,400; and he found the damage to the plaintiffs, by the breach of the covenant of seizin, to be at the time of the breach the sum of $2,400, without interest, as before.

The above finding of damages, in either case, was made subject to the effect of the deed by the Holly heirs to Miller of August 14, 1873, and that of Miller to the plaintiffs of September 6, 1873.

If, in the judgment of the court, these deeds, or either of them, operated to vest the title of the one seventh of the ore right in the lands conveyed to Bristol in the plaintiffs, then the committee found the damage done the plaintiffs by the alleged breach of the covenant of seizin to be one dollar only.

It did not appear that any of the parties to the agreement of October 30, 1867, or to the deeds to and from Bristol, as trustee, had, until after the plaintiffs received their deed from the trustee, any actual knowledge of the incumbrance now claimed by the plaintiffs to have existed when the Miller deed to the trustee was given, and which is alleged in the plaintiffs' declaration.

If, upon the facts found, the court should be of opinion that the incumbrances alleged by the plaintiffs existed, when, and as alleged, the committee found the breach of the covenant against incumbrances as alleged, and the damage for such breach to be the sum of $1,000.

Upon the petition of the defendant Miller against the plaintiffs for the reformation of his deed to Bristol, so that the land would be conveyed in express terms, subject to the six sevenths of the ore right in the Holly heirs, and the right to dig for and transport the ore upon the land, the committee found, in addition to the foregoing facts, the following:

The deed to Bristol, trustee, was intended and understood by the parties thereto, and to the agreement of October 30, 1873, to carry out the undertaking of the petitioner as expressed in the agreement, and no further or additional obligations in reference to the Holly heirs' rights were meant to be assumed in the deed by the petitioner than those the agreement called for, and so far as the deed was drawn otherwise, it was an accidental mistake of the scrivener, not designed, and not known to exist by any of the parties until after the deed was delivered to Bristol, and after his transfer to the corporation.

Upon these facts the cases were reserved for the advice of this court.

C. E. PERKINS, for plaintiffs.

A. P. HYDE, for the defendant.

CARPENTER, J.

The first question presented by this record is a very simple one. Who is entitled to sue for a breach of the covenants of seizin and against incumbrances contained in the deed from the defendant to Louis H. Bristol? It is conceded that these covenants do not run with the land; that they were broken, and that a right of action accrued the instant the deed was delivered. To whom did it accrue? Not to the plaintiffs, certainly, for at that time the corporation was not in existence. The deed was to, and the covenants therein were with, Louis H. Bristol. The legal title, not only to the land, but to the rights of action arising from the conveyance, vested in him and in him alone. That he was a mere trustee, matters not; it only shows that the right of action was in his name as trustee, and that the amount collected would be a fund in his hands for the *cestui que trust*.

The objection that the defendant might resist a suit brought in the name of the trustee on the ground that he personally paid no part of the consideration, is more imaginary than real.

The consideration was in fact paid to the defendant, and he acknowledged in his deed that he received it of Bristol. The fact that other parties furnished the money, is immaterial.

In contemplation of law, therefore, for the purposes of an action on these covenants, the consideration was paid by Bristol.

The statute (Gen. Statutes, title 1, sec. 64), authorizing the assignee and equitable owner of a chose in action, not negotiable, to bring an action thereon in his own name, does not aid the plaintiffs. The plaintiffs are the parties beneficially interested in the right of action, but they are not assignees of a chose in action. Mr. Bristol conveyed the land by a quit-claim deed in the ordinary form, but he did not assign, or attempt to assign, a chose in action. Had he done so, and had the plaintiffs in their declaration alleged that they were the actual and *bona fide* owners of the chose in action mentioned therein, and set forth when and how they acquired title thereto, as required by the statute, their claim in this respect might have been sustained.

As it is, we think it can not be.

We might, and ordinarily would, stop here; but as the parties, for the purpose of avoiding further litigation, unite in requesting us to decide all the questions in this action, we will proceed to dispose of them upon their merits.

We will first consider the covenant of seizin and of good right to sell.

The doctrine that a deed by a tenant in common of a portion of the common estate by metes and bounds, is inoperative as against his co-tenants, is firmly established: *Mitchell* v. *Hazen*, 4 Conn. 495; *Griswold* v. *Johnson*, 5 Conn. 363; *Marshall* v. *Trumbull*, 28 Conn. 183. Mineral and ore rights, when severed from the land and owned by tenants in common, are real estate, and to them the same doctrine applies: *Adam* v. *Briggs Iron Co.*, 7 Cush. 361. Consequently, where the owner of land, from which mineral rights have been severed, is a tenant in common with others of such rights, and conveys a portion of the land by metes and bounds, and also his share of the mineral rights therein, the deed, so far as such easement is concerned, is inoperative as against his co-tenants.

The deed, therefore, from James Blodgett to the defendant, dated April 2, 1867, conveying as it does a portion of the land owned by him, and which was subject to the mineral

rights in question, and attempting to convey the whole of his mineral right in the land conveyed only, the co-tenants not co-operating therewith, was inoperative in respect to those rights as against the other owners.

It follows, therefore, without reference to the prior deeds, or to the fact that the defendant conveyed to Bristol less land than he received from Blodgett, that at the time of the delivery of the deed to Bristol, the defendant was not seized of the one undivided seventh part of the ore rights attempted to be conveyed thereby, and that his covenant in that respect was broken.

The next inquiry is, what is the rule of damages? The general rule is, in actions on contracts, that the plaintiff shall recover the actual damage sustained.

An action for a breach of the covenant of seizin in a deed is not an exception to this rule. It is doubtless true that in such actions generally the actual damage sustained is in fact the consideration paid and interest, because the party takes nothing by his deed. It is, in its inception, and continues to be, a nullity. But if the party takes anything by his deed, directly or indirectly, by its own force or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in estimating the damages. *Mitchell* v. *Hazen*, 4 Conn. 495, is relied upon by the plaintiffs as an authority in support of their claim that they are entitled to recover the consideration paid and interest. A careful examination of that case has satisfied us that the court did not intend to establish an inflexible rule to be applied indiscriminately to all cases. They regarded the deed in that case as wholly inoperative. In that view of the case nothing less than the consideration paid and interest would be a full compensation. The consequences of a partial breach, the deed being effectual to some extent and for some purposes, were not considered by the court.

In ascertaining the actual damage, it becomes necessary to consider what effect is to be given to the deed in the present case. The plaintiffs contend, that that portion of the deed which attempts to convey an undivided portion of certain mineral rights is absolutely void. In support of this claim several

cases in this State are cited: *Mitchell* v. *Hazen*, 4 Conn. 495; *Griswold* v. *Johnson*, 5 Conn. 363; *Marshall* v. *Trumbull*, 28 Conn. 183. In none of these cases was there any confirming grant by the co-tenants; nor were there any circumstances which the court regarded as sufficient, co-operating with the deed to give it validity. In *Mitchell* v. *Hazen*, HOSMER, C. J., says, "The deed passed no title, and in effect was an utter nullity." That is indeed strong language, but it must be understood in its application to the facts of that case. The deed was by an administrator of a tenant in common, without any co-operation whatever, then or subsequently, of the co-tenants. Moreover the learned judge refers to *Bartlet* v. *Harlow*, 12 Mass. 348, as containing a correct statement of the question. A reference to the case will show that the court strongly intimated that the levy of the execution was not wholly void, but might operate as an estoppel, and that intimation was followed and the doctrine distinctly enunciated in *Varnum* v. *Abbot*, 12 Mass. 474, and the same doctrine has been re-affirmed in subsequent cases. In *Griswold* v. *Johnson*, the language of the court is, "The deed of this common estate by metes and bounds, the one tenant in common thus attempting to make a partition of the property without *any co-operation of the other*, is undoubtedly void"; thus clearly implying that the deed, if with the co-operation of the other tenant in common, would not have been void. In *Marshall* v. *Trumbull*, HINMAN, J., says, "Deeds and other conveyances of such property are not merely inoperative against the rights of the other tenants, when a partition is made, but they are, as remarked by Judge HOSMER, undoubtedly void, and the other co-tenants may at all times so treat them." The court certainly could not have intended to say that the co-tenants, after a confirmation by them of the conveyance, were at liberty to treat it as void. Their right to do so is clearly a privilege which may be waived; and having been properly waived, the conveyance is binding upon them, and, operating as an estoppel against the grantor, it vests a complete title in the grantee.

The only reason given in all these cases for holding such deeds void is, that they tend to prejudice the rights of the co-tenants. The rule should not be broader than the reason; and when the reason does not exist the rule should not apply.

Mr. Washburn states the law on this subject as follows: "Such a conveyance of the personal interest of a tenant, however, would be good as to all persons except his co-tenants, and, if not objected to by them, will be valid and effectual to all intents." We think that is stating the doctrine too broadly—at least broader than the authorities will justify. The mere absence of objection on their part does not seem to be sufficient. Their assent, expressed by deed, or in some other proper manner, seems to be required.

In New Hampshire, as in Massachusetts, the doctrine that such conveyances may be made valid and effectual by the act of the co-tenants, is well established: *Great Falls Co.* v. *Wooster*, 15 N. Hamp. 412; *Whitton* v. *Whitton*, 38 N. Hamp. 127.

In view of the authorities in this State and elsewhere, we think the true doctrine to be, that a deed by one tenant in common of a part of the common property by metes and bounds is inoperative as against the other tenants; but if the co-tenants, then or subsequently, by a suitable conveyance confirm the grant, the grantee still holding under his deed, it becomes, in effect, operative and binding upon all concerned.

The doctrine thus stated covers this case. The plaintiffs took and now retain the possession of the whole premises purchased, including the one seventh mineral right. They have a lease from the owners of the remaining six sevenths, so that the whole, for a term of years, vests in them. The other tenants also have by their deed confirmed the sale to the plaintiffs. They have thus solemnly waived their right to object to the conveyance, and, the defendant being estopped by his deed from calling it in question, there is no one who can controvert the plaintiffs' title. In effect all technical difficulties are healed, and the plaintiffs receive in fact just what they purchased.

We have no occasion to determine the equitable rights of Marsh under his contract. If he has any equities, so far as they relate to the one seventh interest now under consideration, they are not superior to the plaintiffs' equities, and can not prevent the confirming deed from having full effect as such.

For a breach of the covenant of seizin therefore, the defendant could be subjected to nominal damages only.

In respect to the covenant against incumbrances little need be said. We are inclined to think that the incumbrance is not sufficiently stated in the deed to save it from the operation of the covenant.

However this may be, it is not stated so clearly and fully in the deed as it is in the agreement for a deed. It is manifest from the report of the committee that it was the intention of the parties that it should be so stated, and that the omission to do so was a mistake of the scrivener, not designed, and not known to exist by any of the parties until after the deed was delivered to Mr. Bristol, nor till after his transfer to the corporation. To that extent, therefore, the petitioner in the bill in equity is entitled to the relief prayed for.

The Superior Court is advised to render judgment for the defendant in the action at law, and for the petitioner in the bill in equity.

In this opinion the other judges concurred.

REAVES ET AL. v. ORE KNOB COPPER CO.

(74 North Carolina, 593. Supreme Court, 1876.)

Construction—Effect of the word "sold." A deed reading, "This deed witnesseth that I * * have this day sold, and by these presents do convey, * * one six'eenth part of my half of all the mineral contained in a certain tract of land, etc. This deed therefore is that I convey * * one sixteenth part, etc.," is by its terms a conveyance of an estate in the mines and minerals, and the word "sold," *ex vi termini*, imports a valuable consideration.

Case agreed. Tried before MITCHELL, J., at the spring term, 1872, of Ashe Superior Court. The plaintiffs, all heirs at law of one Jesse B. Reaves, claim that they are tenants in common with the defendant and have title to one thirty-second part of certain lands, described in the complaint, and ask that their share may be declared, and the premises sold for the purpose of making a partition.

The defendant denies the tenancy in common, and alleges sole seizure in itself, and for the purpose of settling the

rights of the parties, all questions as to the jurisdiction of the court are waived.

It is admitted that the title to the land and minerals in controversy was originally in one Jesse B. Reaves, the ancestor of the plaintiffs, and that the defendant claims the same through mesne conveyances.

All these lands, land and minerals, by mesne conveyances, dating back to 1854, are owned by the defendant, except the one thirty-second part thereof, which is the subject-matter of this controversy.

On the 15th day of August, 1853, Jesse B. Reaves did assign and deliver to one George T. Reaves a paper writing, purporting to be a deed, and purporting to convey one thirty-second part of the minerals in said land to said Reaves, being that part now in controversy. Of which paper writing, the following is a copy:

"This deed witnesseth that I, Jesse B. Reaves, have this day sold, and by these presents do convey unto George T. Reaves, one sixteenth part of my half of all the mineral that is in a certain tract of land, Peak's Creek, in the county of Ashe and State of North Carolina, and known as the Ore Knob, containing fifty acres; that John W. Martin has purchased the half of said mineral from me. This deed therefore is, that I convey unto the said George T. Reaves and his heirs and assigns forever, one sixteenth part of my half of all the minerals of all kinds that said tract of land may contain, to him and his heirs forever. In testimony whereof, I have hereunto set my hand and affixed my seal this 16th day of August, 1853.

Interlined before assigned.

Signed, J. B. REAVES. [SEAL.]

Attest:

A. B. MCMILLAN, Jurat.

Jesse B. Reaves died intestate in the year 1863, and the plaintiffs are his heirs at law, and as such entitled to the one thirty-second part, as claimed, unless their title was divested by the foregoing deed, which was not registered until the year 1875. It is admitted that the land remained unoccupied from the year 1859 until 1872, when defendant took

deeds for all the shares in said land, the share in controversy being purchased from George T. Reaves. His Honor, after argument, rendered judgment in favor of the defendant, and the plaintiff appealed.

SCOTT & CALDWELL, for appellant.

FOLK & ARMFIELD, SMITH and STRONG & JONES, *contra.*

PEARSON, C. J.

It is settled, that under the act, 1715, a deed duly registered has the effect of a feoffment; and no consideration is necessary in order to pass the legal estate. It was conceded on the argument, mines and minerals not severed from the land, are land, and may be conveyed in the same way, and will descend in the same way.

So the case turns upon the effect of the deed, Jesse B. Reaves to George T. Reaves, set out in the case.

The plaintiff takes the position, the deed was made without consideration, and there being no declaration of a use there was a resulting use in the grantor which drew back the legal estate. It is familiar learning, if a feoffment be made for consideration the feoffee acquires title. If a feoffment be made without consideration the feoffor may declare the uses, or he may reserve to himself a power to declare the uses at any future time, or he may give to another the power to declare uses, and so much of the use as is not thus disposed of results to the feoffor. If there be no declaration of a use and no power of appointment, it follows that the entire use results to the feoffor.

The statute brings to it the entire legal estate; the feoffment has no practical effect and was a vain thing. The plaintiff's counsel, in a very learned argument, contends that such is the case in regard to the operation of the deed under consideration. It is insisted for the defendant, the deed was made for a valuable consideration; and he relies upon the words, "this deed witnesseth that I, Jesse B. Reaves have *this day sold*, and by these presents do convey unto George T. Reaves," etc. So the case is narrowed down to this: does the import and meaning of the words "have this day sold" rebut the pre-

sumption of a resulting use of the feoffor which would draw back the legal title? We have seen that a declaration of the use, or a power of appointment, rebuts the presumption of a resulting use, except as to so much of the use as is not disposed of. It is learning equally familiar, if A buys and pays for a tract of land, and directs title to be made to B, without a declaration of the use, there is a resulting use to A. But if B is the son of A, the relation rebuts the presumption of a resulting use. So, if a father makes a feoffment to a son, the relation rebuts the presumption of a resulting use.

The whole current of the authorities shows that the court seizes upon any circumstance to rebut the presumption of a resulting use when no part of the use is disposed of under the maxim "*Ut res magis valeat, quam pereat,*" and will not readily come to the conclusion that the parties have done an idle act. This deed shows upon its face that Jesse Reaves intended to convey the "mines and minerals" to George Reaves; and, as we think, the word "sold" in the connection in which it is used, imports, *ex vi termini*, that the deed was made for a valuable consideration so as to rebut the presumption of a resulting use which would defeat the operation of the deed, and make the action of the parties a vain thing.

There is no error.

PER CURIAM.

Judgment affirmed.

WEILL v. LUCERNE MINING COMPANY ET AL.

(11 Nevada, 200. Supreme Court, 1876.)

Challenge to juror because of opinion as to course of veins. Where a juror, upon his *voir dire*, expressed the holding of a decided opinion as to the course of all the veins in the vicinity of the ground in controversy, but had no knowledge of the particular vein or veins in dispute, and it did not appear upon the pleadings nor otherwise, before trial, that the course of the veins was a material fact in issue: *Held*, that the challenge for cause to such juror was properly disallowed.

Lode; dips, spurs, and angles. The use of the words "dips, spurs, and angles" in a notice of location clearly indicates that it is a lode which is claimed, and not a hill or surface location.

Location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by which they are generally made.

Description—Lode having two names—Construction. A deed which conveys all the grantor's right, title, etc., in and to a certain lode more particularly known as the L. Co.'s claims, located on the Lucerne quartz ledge, *held* to include all the grantor's interest in the lode notwithstanding the fact that he derived title under two different locations—the Lucerne and the Waller's Defeat—both of which were posted upon and claimed the same lode; and that it was immaterial by what particular name he designated it. Where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the ground in the deed, by courses, distances, or monuments, it can not be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known.

Abandonment—Second location within lines of first. Abandonment is a question of intention; and a second location within the lines of a previous location upon a blind lode not developed, for the express purpose of protecting the original location, is not an abandonment of the first.

Appeal from the District Court of Storey County, First Judicial District.

LEWIS & DEAL, for appellant.

MESICK & SEELEY, for respondents.

HAWLEY, C. J.

This is an action of ejectment instituted in pursuance of an act of Congress, to determine the right to certain mining ground for which the Lucerne Mining Company had applied for a patent, and appellant had filed his protest.

The appellant claims title to the mining ground in controversy, under the mining location and claim known as "Waller's Defeat." The respondents claim title under the mining locations and claims known as the "Boston" and the "Lucerne"; the former having been located prior, and the latter subsequent to the location of the "Waller's Defeat." The jury found a verdict in favor of respondents. Appellant moved for a new trial, and from the order overruling that motion this appeal is taken.

Several points are presented and relied upon by appellant, which will be noticed in their regular order.

1. It is claimed that the court erred in refusing appellant's challenge to the juror Mathewson, upon the ground that said juror had formed and expressed an unqualified opinion as to the course and direction of the Waller's Defeat lode. Appellant claimed at the time of the challenge, and still insists, that this was one of the main questions involved in the case, and that under the provisions of the sixth subdivision of section 164 of the Civil Practice Act (1 Comp. L. 1225), the court should have allowed the challenge. Mathewson, upon his *voir dire*, stated that he was well acquainted with all the mining claims in the locality of the mining ground in dispute; that he had a decided opinion as to the course of all the claims in that vicinity; that he knew nothing at all about the merits of the case; that he had no opinion upon the question as to whether or not the Waller's Defeat and the Lucerne claims were on the same lode, and no opinion as to whether there was more than one lode. "If," said he, "there are two or three ledges there, I have an idea where they run."

Upon the trial of this cause, there was some controversy as to the course of the various claims. There was testimony offered by respondent tending to prove that the Waller's Defeat ran with a certain cañon; also, testimony offered by appellant tending to prove that it ran over a hill almost at right angles with the cañon. Without deciding the question as to the meaning of the statute, we are of the opinion that the action of the court in refusing the challenge must be sustained upon two grounds: First. It was impossible for the court to determine from the pleadings or facts before it, at the time the challenge was interposed, whether the course of the lode, or lodes, was, or was not, one of the main questions involved in the case. If appellant desired to present the point upon its merits, he should, in the absence of an admission upon the part of the respondent, at least, have offered to prove by some competent evidence that this was one of the main questions involved in the case. Second. From the answers given by the juror, it seems to us apparent that he was of the opinion that the vein, or veins, of ore upon which the respective claims were located ran in the same general direction; otherwise he would certainly have had an opinion as to whether or not there was more than one lode in

that locality; and also an opinion as to whether or not the Lucerne and Waller's Defeat were upon the same lode. In reply to the questions asked upon this point, he answered in the negative. If his answers were truthful, is it not clear that he could not have formed the opinion, as argued by appellant, that the Waller's Defeat ran with the cañon, and that the Lucerne ran over the hill nearly at right angles with the cañon? For if that was a fact, the claims could not be upon the same lode. The juror having an opinion as to the general direction of the two claims, if he believed they run at right angles, as a matter of course, must have entertained the opinion that they were not upon the same lode. We think it must have been as apparent to the court as it is to us from all the answers given by this juror that his opinion was a general one as to the course of the vein, or veins, of ore; that his opinion was that the vein, or veins, of ore ran in the same general direction; but whether there was but one lode, or whether the Waller's Defeat and the Lucerne were upon the same lode, he had no opinion. The juror entertained no opinion upon this point prejudicial to the appellant, and the court did not err in refusing the challenge.

2. At the close of the testimony offered on behalf of respondents, appellant moved the court "to strike out as immaterial and irrelevant all the testimony * * * relating to the location of the Boston claim and the work done under that location; also, the notice of location of the Boston Company." The court refused to grant said motion. It is argued that the title claimed by respondents is to a lode; that the Boston notice did not claim a lode, but was what is known as a hill claim; that the only controversy in this action is as to the title to a lode, and that no title to the lode can be acquired from a hill location. The notice of the Boston location reads as follows:

"Notice is hereby given that we, the undersigned, have taken up and claim for mining purposes twelve hundred feet of ground on the face of this hill on the south side of Gold cañon, running north 1,200 feet from stake, with all its dips, angles and spurs, from thence to the center of the hill. 7 June, 1859." (Names of locators.)

A narrow or illiberal view in the construction of written

notices of mining locations would often lead to the deprivation of the rights of the locators. In many of the locations made by miners, especially in new mining districts, the notices of location are frequently found to be vague and indefinite. They are often prepared upon the ground, and usually written by men unaccustomed to the forms used by lawyers. A common sense view must be taken of such notices. What was the intention of the parties who made the location? If, in the present case, we seek for that intention from the language employed in the notice, is it not found in the use of the words "with all its dips, angles and spurs?" In mining parlance these words have a definite meaning. They refer to a lode, not to surface or hill claims. Although the word ledge, lode, or vein, does not appear in the notice, we think, independent of any testimony offered to prove the intention, that the only fair and reasonable construction to be given to the notice is, that it was the intention of the locators to claim a lode with all its dips, angles, and spurs. If the testimony of witnesses is to be considered, the same conclusion is reached. The testimony of Surrhyne, who wrote the notice of location, clearly shows that it was the intention of the locators to take up four claims upon a blind lode, and not to make a hill or surface location.

3. The deed from Surrhyne to the Lucerne Mining Company, under which the respondents claim title, does not mention the Boston notice or claim. It conveys an undivided interest "of all that gold and silver mining ledge or ground * * * more particularly described as follows: to wit, That set of claims known as the Lucerne Company's claims, of 1,800 feet in extent, located on the Lucerne quartz ledge. Said company's claims running northerly from a certain shaft sunk upon the lead aforesaid one thousand feet, and running south from said shaft eight hundred feet, * * * being the undivided interest of the party of the first part, in all that original claim located by the Lucerne Company, and duly recorded in the Gold Hill records."

Did this deed convey any title to the ground claimed by the Boston notice of location? It appears from the testimony that the Boston notice was written and posted upon the ground in July, 1859; that, thereafter, in March, 1860, the

same parties who had located the Boston, using their own names and the names of ten other persons, located the Lucerne, claiming fourteen claims on the Lucerne ledge. The notices of the Boston and Lucerne locations were both written by Surrhyne, the grantor of the deed to the Lucerne Mining Company. The Lucerne notice was posted on a stake at the north end of the Boston claim, and extended "in a southerly direction twenty-eight hundred feet." The testimony offered upon the part of the respondents tended to prove that the locators of said claims fully complied with all the mining laws, rules and regulations of the district, as to amount of work, posting and recording of notices, etc.; that at the time the locations were made, the parties were prospecting for a blind ledge; that the object of the locators in making the Lucerne location was to keep off other parties from making any locations that would be likely to conflict with the Boston, and possibly to get a little more ground; that subsequent developments established the fact that the Lucerne notice covered the same lode claimed by the Boston notice. Upon this state of facts, appellant asked the court to give the following instruction: "You are instructed that the defendants derived no title whatever to the claim located by the Boston company by the deeds introduced in evidence by the defendants, and that no title to the Boston claim has been shown to be in the defendants, or either of them, by such deeds. The only title conveyed by such deeds is that to the Lucerne claim, located in March, 1860." * * * This instruction was clearly erroneous. Surrhyne, the grantor of one of the deeds, was one of the locators in the Boston. He was also one of the locators in the Lucerne. He afterward conveyed his undivided interest in the lode or ground described in the deed. The deed was a quitclaim deed. By it he conveyed "all his right, title, interest, claim and demand, of, in and to" the lode and premises therein described. If the Boston notice and the Lucerne notice were posted upon, and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest under both locations, and it was immaterial by what particular name he designated it: *Phillpotts* v. *Blasdel*, 8 Nev. 61.

4. Testimony was offered by appellant, in rebuttal of re-

spondent's case, tending to prove that the locators of the Boston claim had treated it as separate and distinct from the Lucerne claim, and several deeds from the various locators in the Boston were introduced in evidence, in some of which the Boston ground was described as being bounded on the north by the Lucerne. The object of this testimony was to show that it was not the intention of Surrhyne at the time of executing the deed, already referred to, to convey his interest in the Boston claim. Upon this point, appellant asked the court to instruct the jury as follows: "In order to reach the conclusion that any title to the Boston claim is conveyed by the deeds introduced in evidence by the defendants, you must believe that the grantors in those deeds intended to convey such claim, and that the grantees intended to purchase it."

This instruction was calculated to mislead the jury. The conclusions we have reached upon other points fully justify the action of the court in refusing to give this instruction. But little need be added to what we have already said. As an abstract proposition of law, it may, for the purpose of the argument, be admitted, that the instruction is correct. It is the intention of the parties that imparts life to every contract, and controls the court in the construction of every written instrument. But how is that intention to be ascertained? When the language of a deed is doubtful, the first thing we inquire is: What was the intention of the parties? But courts do not always seek for the intention of the parties independent of the language used in the deed. On the contrary, we think it is a well-settled legal principle, that where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the grounds, in the deed, by courses, distances or monuments, it can not be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known. It is only when the language is equivocal, imperfect or ambiguous, and the location of the ground, or identity of the lode or lodes, made doubtful, that the construction put upon the deed by the parties who located the ground may be resorted

to, to aid in ascertaining the intention of the parties. The very object of a description in a deed is to define what the parties intended the grantor to convey and the grantee to receive by the conveyance. That intention, in the present case, is plainly deduced from the language contained in the deed. The description of the ground conveyed is definite: "That gold and silver mining ledge or ground * * * running northerly from a certain shaft sunk upon the lead aforesaid one thousand feet; and running south from said shaft eight hundred feet." It was for the jury to determine whether there was but one lode; whether the Boston notice and the Lucerne notice were posted upon and claimed the same lode, and whether the description in the deed covered the ground included in the Boston notice? And it was for the court to determine the legal effect to be given to the deed. If it was admitted that there was but one lode, that both notices of location were on that lode, and that the ground located by the Boston company was within the limits of the ground conveyed, it seems to us too clear for argument, that the effect of the language used in the deed was to convey the grantor's interest in that lode, from whatever locations it may have been acquired, or by whatever name it may have been designated.

5. Finally, it is contended that the court erred in refusing to give this instruction: "The jury are instructed that if they believe from the evidence that the locators of the Boston claim relocated the Lucerne claim upon the same ledge as that which they claimed under the notice of location of the Boston company, commencing at the north stake of the Boston claim and claiming 2,800 feet, including the ground claimed by the Boston company's notice, such relocation is an abandonment of the Boston claim, and they must exclude from their consideration the Boston claim and all work done under it."

This instruction presents the simple question whether, as matter of law, the fact of making a second location upon the same lode with the names of other parties included in the notice of location, is an abandonment of the first location. The answer to this is plain. The question of abandonment is one of intention. Whether it was the intention of the original locators of the Boston claim to abandon their interest in the

ground derived from the Boston notice of location and the work done under it, was a question of fact for the jury to determine from all the facts and circumstances of the case. It is sometimes difficult in new mining districts, the mining ground being undeveloped, and the course of the croppings, if any, not being clearly defined, to determine the direction of the lode, or to determine the fact whether or not there is but one lode. We believe it is not an uncommon practice for miners in making locations under such circumstances, to post one or more picket notices of location as a protection to the original claim, to keep off other parties from making any locations that would be liable to interfere with the first location. Now when the developments establish the fact that the subsequent notices were really posted on the same lode as the first, it seems to us, in the absence of any mining law, rule or regulation of the district that such an act shall work a forfeiture of the rights of the locators under the first notice, that the argument advanced by appellant that a second location made under such circumstances, for the express purpose of protecting the original location, of itself, constitutes an abandonment of the first notice, is illogical and unsound.

We are not called upon in this case to determine what, if any, rights were acquired by the second notice of location; or the rights, if any, of the additional locators in the second notice, and upon these questions we express no opinion.

The judgment of the District Court is affirmed.

Mr. Justice BEATTY concurred in the judgment.

WILCOX v. LUCAS ET AL.

(121 Massachusetts, 21. Supreme Court, 1876.)

[1] **Misdescription of ore vein; mistake—Injunction against suit on warranty, pending reformation.**—A, the owner of a lot of land upon which were certain ores, conveyed to B all the iron ores, metals and minerals in and upon a portion of the lot, describing it by metes and

[1] *Hartford Co.* v. *Miller*, 3 M. R. 353; *Kinney* v. *Con. Virginia Co.*, 4 Saw. 383; *Post* MISTAKE.

bounds, with a right of entry to dig and carry away the ores. Subsequently A conveyed by warranty deed, all the minerals upon the whole lot to C, describing it by metes and bounds, with a right of entry to dig and carry away the ores; reserving all rights conveyed to B by the first deed. The property described in the second deed was in fact bought by B and C upon joint account, and C took the deed in trust for himself and B. While the property was so held, B and C negotiated a sale of an undivided third part thereof to D, and thereupon C executed a deed of warranty to B and D, conveying to each an undivided third part of all the rights described in the second deed. This third deed was intended as an execution of the trust above mentioned by conveying, for the joint benefit of C and B, to D the share which he had purchased, and also to B the share to which he was equitably entitled. The scrivener who wrote this deed, without any instructions relative to the reservation in the second deed, from which he copied, left it out, supposing it to be immaterial. B, C, and the scrivener, all supposed that no part of the iron vein described in the first deed was included by the description in the second deed. D knew nothing about the iron vein or the first deed. Afterward C and D each conveyed their respective interests to B, so that he became the sole owner, subject to a mortgage by him to D. It was determined in an action by E, who had become the owner of the rights described in the first deed, against B for trespass, that the minerals described in that deed were upon the land described in the second and third deeds. B paid the judgment recovered in that action against him and commenced an action at law against C for breach of the covenants contained in the third deed. On a bill in equity, brought by C against B and D, to reform the third deed so that the property and rights described in the first deed might not be included therein, and that B might be restrained from prosecuting his action against C. *Held*, that C was entitled to an injunction restraining B from setting up the covenants in the third deed, as applicable to the vein of iron ore, so far as regards one undivided half of the premises, viz., the one third conveyed to B, and one half of the third conveyed to D, and also restraining B from prosecuting his action against C, except so far as might be necessary to ascertain the amount of damages, until B should have procured D's assent to such a reformation of this deed, or to such a release as would secure C's rights.

Bill in equity by Henry D. Wilcox against Heman S. Lucas and Charles Allen. Hearing upon pleadings and proofs before COLT, J., who reported the case for the determination of the full court in substance as follows:

On January 22, 1864, Erastus Wright, being the owner of a lot of land in Chester, upon which were certain ores, metals and minerals, sold and conveyed to Lucas all the iron ore, metals and minerals in and upon a portion of the lot (described by metes and bounds, being a strip of ten rods wide, following

the course of a vein of iron ore) with the right at all times to enter for the purpose of digging and carrying away the same.

On March 16, 1869, Wright sold and conveyed by warranty deed to Wilcox all the ores, metals and minerals in and upon the whole lot (describing it by metes and bounds), with like right to enter, dig and carry away, "excepting and reserving all rights, privileges and easements conveyed" by Wright to Lucas by the first deed.

Wilcox and Lucas bought the property described in the second deed upon joint account and as equal owners, and the deed was made to Wilcox alone, he holding the property under it as trustee for Lucas and for himself, because for some reason Lucas did not then desire to be publicly known in the transaction.

While the property was so held, Wilcox and Lucas together negotiated a sale of an undivided third part thereof to Alden; and on April 1, 1869, Wilcox executed a deed of warranty, with the usual covenants, to Lucas and Alden, purporting to convey to them two undivided third parts of all the rights, privileges and easements described in the second deed (repeating the description of the whole lot by metes and bounds), "meaning hereby to convey to said Heman S. Lucas one undivided third part of the above described rights, privileges and easements and one undivided third part to Charles Alden."

The third deed, as between Wilcox and Lucas, was without further consideration and was intended and understood to be an execution of the trust above mentioned, by conveying for the joint benefit of Wilcox and Lucas to Alden the share which he had bought, and by transferring to Lucas the legal estate in that to which he was equitably entitled. The scrivener who wrote this deed had before him at the time, the second deed, or a copy of it; he was directed to make a warranty deed, but he was not told either to insert or to omit the exception or reservation named in the second deed, and nothing was said to him by either of the parties about it; and he left it out in making the deed because of the above direction, and because he supposed that its omission was immaterial. At this time, Wilcox and Lucas and the scrivener, under a mistake as to the

true interpretation of the deed in the location of the premises, supposed the situation of the iron vein described in the first deed, to be such that no part of the property conveyed by that deed was included within the limits of the description of the second deed. There was no mistake or misunderstanding as to the language used in the third deed nor any other mistake regarding it, except the mistake as to the situation of the iron vein. Alden was not present when this deed was prepared and had no reason to expect that it would be made differently from what it was, and knew nothing about the iron vein or the first deed.

On May 2, 1870, Wilcox conveyed his remaining third part of the property to Lucas, and Alden also afterward conveyed his share to Lucas, so that Lucas became the sole owner of the property, subject, however, to a mortgage made by him to Alden.

Lucas having begun the business of mining emery upon the land, and opened the mine with the assistance of Wilcox, the Chester Emery Company, which had become the owner of the rights conveyed by the first deed, brought an action of tort in the nature of trespass against Lucas, and recovered judgment for something more than $3,000, whereby it was ascertained and determined that the minerals described in the first deed were upon the land described in the second and third deeds. See *Chester Emery Co.* v. *Lucas*, 112 Mass. 424. Lucas paid that judgment, and commenced an action at law against Wilcox for breach of the covenants contained in the third deed.

The present bill prayed that Lucas and Alden might be ordered to correct and reform the third deed, so that the property and rights described in the first deed might not be included therein, and that Lucas might be restrained from prosecuting his action at law against Wilcox, and from selling or conveying the property and rights erroneously included in the third deed, and for further relief. The plaintiff at the argument waived all claim to relief as against Alden.

G. M. STEARNS, for the plaintiff

A. L. SOULE, for the defendants.

GRAY, C. J.

By the second deed, executed March 16, 1869, all the ores, metals and minerals upon the whole lot were conveyed by Wright to Wilcox, excepting and reserving the vein of iron ore previously conveyed by the same grantor by the first deed. Although the legal title in all that was conveyed by the second deed thereby vested in Wilcox, the report shows that he in fact bought the property upon joint account for himself and Lucas equally, and that Lucas was equitably entitled to half of it by way of resulting trust.

By the third deed, dated April 1, 1869, the plaintiff, Wilcox, conveyed to each of the defendants, Lucas and Alden, an undivided third of the premises described in the second deed, without any reservation or exception, and with full covenants of warranty. But the report shows that the plaintiff and Lucas jointly had negotiated the sale of an undivided third part to Alden; that, as between the plaintiff and Lucas, this deed was intended and understood to convey for their joint benefit to Alden the share which he had so bought, and to transfer to Lucas the legal title in that half of the remaining two thirds to which he was already equitably entitled; and that the reservation or exception of the rights in the vein of iron ore, which had been inserted in the deed to Wilcox, was omitted in the deed from him, under a mutual mistake participated in by Wilcox and Lucas and the scrivener who wrote the deed, that the iron ore was not within the land described therein.

This mistake did not depend upon the legal meaning of the words used, but upon the application of the description in the deed to the land, which involved a mere question of fact: *Chester Emery Co.* v. *Lucas*, 112 Mass. 424; *Hoar* v. *Goulding*, 116 Mass. 132. In such a case, there can be no doubt of the power and the duty of a court of chancery to restrict the operation of the deed to what was actually understood and intended by the parties, either by ordering the deed to be reformed, or by restraining the grantee from availing himself of it beyond the mutual understanding and intention: *Glass* v. *Hulbert*, 102 Mass. 24; *Jones* v. *Clifford*, 3 Ch. D. 779, 792.

The plaintiff is therefore entitled to a decree, in such form as the circumstances of the case may require and admit, to

prevent the defendant, Lucas, so far as any interest was directly conveyed to him by this deed, from relying upon the grant or the covenants therein contained, as giving him any right against the plaintiff by reason of the vein of iron ore having been since ascertained to be situated within the land described in this deed.

As to Alden the case stands differently. He is found by the report to have had no knowledge of the mistake. He therefore acquired an absolute title, legal and equitable, to the third part conveyed to him, according to the unrestricted terms of the deed, with a corresponding right to enforce the covenants of warranty. This title and right he might convey to Lucas or to any other person. In the absence of any evidence of fraud, or other qualifying circumstances, Lucas must be taken to have acquired, by his subsequent purchase of this third from Alden, all Alden's rights.

But, as the conveyance of this third, which had previously been held by Wilcox in trust for the benefit of himself and Lucas jointly, was made to Alden for the joint benefit of Wilcox and Lucas, both are equally liable in equity on the covenants of warranty in that conveyance, so far as relates to this third; and, in order to prevent circuity of action, Lucas should be restrained from enforcing those covenants as to one half of this third.

Upon the grounds already stated, the mortgage made by Lucas to Alden constitutes a valid incumbrance in Alden's hands upon whatever share of the estate Lucas had the legal title in at the time of executing the mortgage. But, as between the plaintiff and Lucas, Lucas could not, by any alienation of the estate, in fee or in mortgage, increase the liability of the plaintiff upon the covenants of warranty in the deed of April 1, 1869.

As to the conveyance of May 2, 1870, from the plaintiff to Lucas, of the other third, which had remained the plaintiff's property after his conveyance to Lucas and Alden, no mistake is alleged or proved, and no relief is sought.

The result is that the plaintiff is entitled to an injunction restraining Lucas from setting up the deed of April 1, 1869, or the covenants therein contained, as applicable to the vein of iron ore, so far as regards one undivided half of the prem-

ises, consisting of the third part conveyed to Lucas by that deed, and of one half of the third part which was thereby conveyed to Alden, and afterward conveyed by Alden to Lucas, and also restraining Lucas from prosecuting his action against the plaintiff upon those covenants, except so far as may be necessary to ascertain the amount of the damages, until he shall have procured Alden's assent, either to such reformation of that deed, or to such release as will secure the plaintiff's rights, and until such reformation shall have been ordered by the court or such release executed by the parties. The terms of the decree must be settled before a single judge.

Decree accordingly.

JOHNSON ET AL. v. BADGER MILL AND MINING COMPANY.

(13 Nevada, 351. Supreme Court, 1878.)

Statutory form of acknowledgment. A compliance in substance with the form given in the statute is sufficient.

Knowledge of parties. A defective acknowledgment can not be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage.

Corporate acknowledgment—Clerical misprision. The omission of the word "*be*" from a certificate of acknowledgment, as follows: "H. G. Rollins, known to me to the president of the Badger Mill and Mining Company," *Held*, to be a clerical error. *Held*, also, that the certificate sufficiently identifies Rollins as the person who signed the instrument as president.

Foreclosure—Duty of court. In a suit to foreclose a mortgage in which other lien claimants are parties, it is the duty of the court to determine the relative rights of all the parties.

Appeal from the District Court of Humboldt County, Fourth Judicial District.

LEWIS & DEAL, for appellants.

GEO. P. HARDING, for respondents.

By the court, HAWLEY, C. J.

The plaintiffs obtained a decree for the foreclosure of a mortgage against the property of the defendant, the Badger Mill and Mining Company. They appealed from the judgment and claim that the court erred in refusing to admit their mortgage in evidence, as against certain lien-holders, who were made parties defendants in order that their rights might be heard and determined in this action; and that, under the issues raised by the pleadings, it was the duty of the court to determine the *status* of the several liens held by the respective parties. The mortgage in question was executed by H. G. Rollins, president, and O. H. Spencer, secretary, of the Badger Mill and Mining Company.

The certificate of acknowledgment, which was objected to as insufficient, reads as follows: "State of California, city and county of San Francisco, ss. On this sixth day of October, A. D. 1875, before me, A. S. Gould, a commissioner of deeds for the State of Nevada, duly appointed, commissioned and sworn, residing in said city and county, personally appeared H. G. Rollins, known to me to the president of the Badger Mill and Mining Company, and O. H. Spencer, known to me to be the secretary of the Badger Mill and Mining Company, the corporation that executed the foregoing instrument, and acknowledged to me that said corporation executed the same freely and voluntarily for the uses and purposes therein mentioned, and affixed thereto the corporate seal of said corporation," etc.

Under the laws of this State it is essential that the certificate should show the fact of the acknowledgment and the identity of the person: 1 Comp. Laws, 235; *Henderson* v. *Grewell*, 8 Cal. 581.

The form of the certificate is, in several respects, irregular. The law, however, does not require that the exact form of the certificate given in the statute shall be followed. All that is necessary is a substantial compliance with the statute: *Morse et al.* v. *Clayton*, 13 Smedes & Marshall, 381; *Chandler* v. *Spears*, 22 Vt. 407; *Troup* v. *Haight*, 1 Hopk. Ch. 244; *West Point Iron Company* v. *Reymert*, 45 N. Y. 706; *Scharfenburg* v. *Bishop*, 35 Iowa, 60; *Calumet and Chicago Canal and Dock Company* v. *Russell*, 68 Ill. 426; *Deery* v. *Cray*, 5 Wal. 807; *Carpenter* v. *Dexter*, 8 Wal. 526.

The only objection urged by the respondents, and the only one that we shall consider, is as to the identity of the person. It is claimed that the certificate is defective in failing to state that Rollins was known to the commissioner to be the president of the corporation, or in other words, to be the person described in and who executed the mortgage. We are of opinion that it is apparent on the face of the certificate that the omission complained of is of the word "be," and that it is a clerical error.

This case is not analogous to that of *Wolf* v. *Fogarty*, 6 Cal. 224, and other cases, where the omission was of the word "known." Such an omission in the certificate has usually been held fatal, because it partakes of the substance required by the statute: Proffatt on Notaries, sec. 32, and authorities there cited. In *Wolf* v. *Fogarty* it was said that the omission might as well be supplied "by claiming or representing himself, as by known or proved."

In *Tully* v. *Davis* the court said it was "in fact as easy to fill the blank so as to make the certificate and acknowledgment void, as to so fill it as to make them good": 30 Ill. 108.

But in the present case, when the entire certificate is considered, it is manifest that the omission of the word "be" is a mere clerical error and ought to be disregarded. In our opinion, no other sensible interpretation can be given to the certificate. No blank space is left in the certificate to be filled up. The commissioner uses the same words with reference to the secretary as the president with the addition of the word "be" properly inserted. We think the certificate is sufficient to identify Rollins as the person who signed the mortgage as president of the Badger Mill and Mining Company.

In *Scharfenburg* v. *Bishop*, *supra*, the word "appeared" was omitted and the court held that the omission "was manifestly a mere clerical error."

In *Chandler* v. *Spear*, *supra*, in the body of the deed one of the grantors was described as Richard G. Bailey, and the deed was signed R. G. Bailey. The certificate stated "Oliver Hale and Daniel Brown and Richard G. personally appeared and acknowledged this instrument, by them sealed and subscribed," etc. The court said: "Although the name 'Bailey'

is omitted in the acknowledgment, yet the statement that Richard G., who executed the instrument, acknowledged it, does, we think, render it sufficiently certain that it was acknowledged by Richard G. Bailey, the grantor."

In *Calumet and Chicago Canal and Dock Co.* v. *Russell*, *supra*, the acknowledgment was of a married woman, and under the laws of Illinois it was essential that the contents and meaning of the instrument should be explained to her. The certificate used the words "the contents and meaning of my husband." The Supreme Court said that the certificate must be regarded in a common sense view; all its parts must be taken together and a meaning given to it which it is qualified to bear. The court, after discussing the question at great length, and reviewing numerous authorities, came to the conclusion that the case showed "to the satisfaction of the most inexperienced, on taking the entire certificate into consideration, that the contents of the deed were made known to her," and held the certificate to be sufficient to impart notice.

The conclusion almost universally arrived at, in the various cases we have examined, is that as long as the substance is preserved, mere technical objections will not be favored. In *Morse* v. *Clayton*, *supra*, the court say: "These certificates should be liberally construed; that it is neither the duty nor the inclination of courts, where substance is found, to jeopardize titles in any way depending upon them, by severe criticisms upon their language."

Equally clear and emphatic is the language of the Supreme Court of the United States in *Carpenter* v. *Dexter:* "In aid of the certificate reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections."

From the views already expressed it is unnecessary to determine whether the offer of plaintiffs to prove actual knowledge upon the part of the several lien claimants of the existence of the mortgage was sufficiently explicit to show that the court erred in refusing to allow the evidence.

The rule is certainly well settled that a defective acknowl-

edgment can not be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage: 3 Hilliard on Real Property, 676, sec. 36, and authorities there cited.

The decree of foreclosure against the Badger Mill and Mining Company is correct as far as it goes, and is affirmed; but it was the duty of the court, in this action, to proceed and determine the relative rights of plaintiffs and the lien claimants, and to decide whether the lien of plaintiffs' mortgage was prior to, or subsequent to, the other liens, and to enter such a judgment and decree in that respect as the evidence might warrant.

The action of the court in refusing to adjudicate that question amounted to a judgment of dismissal, without prejudice, in favor of the lien claimants, and was erroneous.

The cause is therefore remanded for further proceedings.

LEONARD, J., having been of counsel in the court below, did not participate in the foregoing decision.

Cause remanded.

WALLACE v. SILSBY ET AL.

(42 New Jersey Law, 1. Supreme Court, 1880.)

Notice by record. That the title of the grantor, as it appears in regular sequence and unbroken continuity on the record, is a fact within the consciousness of the grantee at the time that he accepts his conveyance, is a conclusion *juris et de jure*.

Two deeds—One indivisible transaction. At the time of the conveyance to plaintiff the registry of deeds showed that his grantor had previously conveyed to the N. J. Co. all of the ores upon the tract. By the pleadings it was shown that before the conveyance to plaintiff, the N. J. Co., to correct a mistake, had reconveyed all such ores to plaintiff's grantor, who, on the same day, conveyed back to the N. J. Co. all the *zinc* ores upon the tract, but that the two last mentioned conveyances were unknown to plaintiff at the time he took his deed. *Held*, that these two conveyances constituted one transaction, and that plaintiff could not separate them into parts and thus acquire a title to the zinc ores through the momentary seizin vested in his grantor by the deed from the N. J. Co., but which was immediately divested by a reconveyance.

Special title in stranger—No defense to trespass. In a suit for trespass in digging and carrying away zinc ores, the pleadings showed a general title to the *locus in quo* in plaintiff, but a title to the zinc ores in a stranger with whom defendants failed to connect themselves. *Held*, that this did not justify the conduct of defendants, and that plaintiff must have judgment on the pleadings.

Trespass *quare clausum fregit*, etc., and there digging and carrying away zinc ore, etc.

There were certain special pleas which, as a justification, attempted to show, by the statement of certain facts, that the ore in question was the property of "The New Jersey Zinc and Copper Mining and Manufacturing Company," and which company had the right to enter upon the *locus in quo* and to take said ore therefrom. There was no connection shown between this company and the defendants. The facts pleaded to make out this title, and to show the real situation of the parties are as follows, viz.: that the plaintiff, Wallace, derived his title to the premises in fee in the year 1856, from one Samuel Fowler, who, on the 10th of September, 1847, had conveyed in fee to the said "The New Jersey Zinc and Copper Mining and Manufacturing Company" "all the zinc, copper, lead, gold and silver ores, and such ores of iron as might be commingled or connected with the zinc or copper located in or upon or under the said close," giving the right to enter and mine, etc. This deed was recorded on the 29th of December, 1847. In 1847, Samuel Fowler conveyed in fee the premises, without reserving the ore, to John Fowler, who, in like manner, in 1849, reconveyed them to the said Samuel. These deeds were recorded, the first in 1849, the second in 1850. On the 6th of June, 1853, the zinc company reconveyed to said Samuel Fowler all the estate in the ores which it had derived from him under his deed of the 10th of September, 1847, and on the same day, by a deed of the same date, Samuel Fowler reconveyed to the company. The plea alleges that these two last deeds were for the purpose of correcting a mistake in the original deed, which was intended to convey only the zinc ore, but which, from inadvertence, had embraced certain other ores.

Argued at November Term, 1879, before BEASLEY, Chief Justice, and Justices DALRIMPLE, VAN SYCKEL and DIXON.

JOHN LINN, for the plaintiff.

ROBERT GILCHRIST, for the defendants.

The opinion of the court was delivered by BEASLEY, Chief Justice.

This suit is for breaking and entering the plaintiff's close, and for digging up and taking therefrom certain zinc ore. The pleas demurred to are attempts to justify this act. In form they are special traverses, and, consequently, in testing their sufficiency we look at the facts stated in the inducements. That the substance of the inducement is the proper standard wherewith to measure the legal effect of the defense thus interposed, is a subject discussed in the brief of the counsel of the plaintiff, but, as I consider the doctrine unquestionable, it is assumed by me as a premise.

The defense thus presented is that the ore in question was not the property of the plaintiff, but belonged to a certain corporation, formerly known as "The New Jersey Zinc and Copper Mining and Manufacturing Company." It is stated that the plaintiff took his title in the year 1856 from one Samuel Fowler, who, on the 10th of September, 1847, had conveyed in fee to the company just mentioned "all the zinc and copper, lead, gold and silver ores, and such ores of iron as might be commingled or connected with the zinc or copper located in or upon or under the said close," together with the right to mine and take away such ores, etc. This deed was recorded. It further appears that afterward, in the year 1847, Samuel Fowler conveyed, without reservation, the entire premises to one John Fowler; but such deed is immaterial in this inquiry, as the latter reconveyed the same to him in the year 1849.

Therefore, it will be noted that, if the statements in the plea had stopped at this point, an indisputable title to these ores had been shown to reside in this corporation. Samuel Fowler was the grantor of the plaintiff, in the year 1856, and the registry in the county clerk's office manifested that, about nine years before, such grantor had conveyed away to "The New Jersey Zinc and Copper Mining and Manufacturing Company" in fee, the ores which are in dispute. This prior

deed was duly recorded at the time of the second conveyance, and as it stood in the direct line of the title through which the plaintiff claimed, he is chargeable with full knowledge of its existence. I find in the brief of the counsel of the defendants quite an elaborate discussion of the proposition that, from this state of the record, a knowledge of this prior conveyance is imputable to the plaintiff; but it seems to me that it is entirely unnecessary to vindicate the point, either by argument or authority. On any other hypothesis, the registration of conveyances would be an idle form. That the title of the grantor, as it appears in regular sequence and unbroken continuity on the record, is a fact within the consciousness of the grantee at the time that he accepts his conveyance, is a conclusion *juris et de jure*. This is a doctrine which I do not think has ever been brought into d ubt in this State, and in this case it is not, in any respect, gainsaid by the counsel of the plaintiff. He makes his contest upon the ground which I shall now proceed to explain.

Besides the conveyances already mentioned, there are two other deeds stated in the plea. I have said that the plaintiff acquired his title, in the year 1856, from Samuel Fowler. Just prior to this, "The New Jersey Zinc and Copper Mining and Manufacturing Company," on the 6th of June, 1853, conveyed to this Samuel Fowler, in fee, all the ores which he had granted to said corporation, by his deed in 1847; and on the same day, by his deed, he reconveyed all the zinc ore now in question to the company. This conveyance and this reconveyance were not recorded at the time the plaintiff got title, and the plea avers that he had no notice of the transaction. The object of such a course of conveyancing is fully explained in the plea, from which it appears that Samuel Fowler claimed that, by his original deed, executed, as above stated, in the year 1847, he had by inadvertence conveyed to the zinc company other ores than the zinc ores, and to correct that error, this transfer and retransfer were resorted to. Receiving these instruments according to their intrinsic force, they are beneficial to the plaintiff, for their admitted operation is to incorporate with the land purchased by him certain ores which he then supposed his grantor did not own. But, not satisfied with this unexpected accretion, he further claims the zinc ores

in question, and it is this claim that has brought on this controversy.

The point made is a technical one, for the contention on the part of the plaintiff is that he can exact the benefit of the conveyance of all the ores by the zinc company to his grantor, Samuel Fowler, and also repudiate the reconveyance of the zinc ores by the latter to the former, for the reason that such reconveyance was not on record when he acquired his own title. Inasmuch as neither of these last mentioned conveyances was then recorded, and the demurrer admits the entire ignorance of the plaintiff with respect to either of them, and as the deed to the zinc company, in 1847, was then recorded, showing that the corporation was the owner of all the ores, it is obvious that the designation of this position as a technical one is entirely justified; nevertheless, the plaintiff is entitled to stand securely upon it, if he can establish his position as a legal one. The question is, how has he succeeded in this respect?

Upon reflection, it seems to me that, in this endeavor, he has plainly failed. As the two deeds in question were unrecorded, and their existence was unknown to the plaintiff when he acquired his estate, no one will deny that it was competent for him to repudiate altogether both those instruments. In such a position, his rights could not be affected by the acts of his grantor, of which, when his interests became fixed, he had no notice, either express or implied. So it is clear that he could take to himself such rights as inhered in the lands conveyed to him, and which were within the scope of his grant, even though such rights had been acquired by his grantor, or other privies in estate, by a deed unpromulgated by being put upon the record, or otherwise. But this is not that case. The difficulty of the plaintiff's position is that he is seeking not to disallow a particular unknown transaction affecting his title but to disallow only a part of such transaction; he wishes to halve the affair of the conveyance and reconveyance, letting the former stand and the latter fall. He is not in a situation to explode the entire matter, for to do so would bring into play the deed to the company, of 1847, which would divest him of every particle of title to the ore in question. The effort, therefore, is to divide into parts the act of the conveying

and reconveying of this property, and to regard it as two substantive transactions, and herein is the flaw in the legal position of the plaintiff. In legal contemplation, this transfer and retransfer of this ore were but a single transaction, which can not be disintegrated for the purpose of annexing to its several parts qualities that would not belong to them except in an uncombined condition.

That the transaction is one and not several, appears from its object, and also from the express averments of the plea. That two instruments were made use of, can not alter the nature of the thing done, for, in such matters, the intention of the parties is everything and the form nothing. The purpose here was to revest in Samuel Fowler all the ores except the zinc ores; this could have been effected by a conveyance of such ores from the company to him. The same end has been reached by the circuity of the present conveyances; and, as by the use of the former method, no pretense of a claim on the part of the plaintiff could have arisen, why should a difference exist when the same intention has been executed in a changed form? If the law regarded only the outward figure and mode of this business, the contention of the plaintiff might doubtless be sustained; but such is not the case. It is true that by the conveyance of this zinc, in connection with the other ores, by this corporation, to Samuel Fowler, the grantor of the plaintiff, a seizin was vested in him; but as it was the intention of the parties to put such seizin in him for a particular purpose, and only for an instant, it could not inure to the benefit of the plaintiff. That such a legal investiture of the possession should have any effect, except such as the parties designed, would be very unreasonable. Nor do I find that any greater effect has ever, in analogous cases, been imparted to such a proceeding. Whenever a momentary seizin has been given to accomplish a present object, the effect of such seizin has been limited to the accomplishment of the object. The questions which have arisen under claims of dower afford apt illustrations of the doctrine. In all such instances it has been, I believe, invariably held that a seizin *in transitu* to subserve a particular purpose will not entitle the widow to dower, in contravention of such purpose. Chancellor KENT, in Vol. IV,

p. 38, of his Commentaries, expounds the subject in terms very applicable to the present purpose. He says: "A transitory seizin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in case of a conusee of a fine, is not sufficient to give the wife dower. The land must vest in the husband beneficially for his own use, and then, if it be so vested, but for a moment, provided the husband be not the mere conduit for passing it, the right of dower attaches. Nor is the seizin sufficient when the husband takes a conveyance in fee, and, at the same time, mortgages the land back to the grantor, or to a third person, to secure the purchase money, in whole or in part. Dower can not be claimed as against the rights under that mortgage. The husband is not deemed sufficiently or beneficially seized by such an instantaneous passage of the fee in and out of him to entitle his wife to dower as against the mortgagee, and this conclusion is agreeable to the manifest justice of the case." It is obvious that all the considerations here given for the existence of this doctrine, in its application to dower, should be equally potent in their bearing on the law of the case now under consideration, for here, as in the case of the momentary seizin in the husband, the grantor of the plaintiff was not beneficially seized, even for a moment, in the ore forming the subject of litigation. In the case of the dowress, the law looks beyond the mere form, which, technically, is in her favor, to the purpose for which such form is used, and departing from the letter of the transaction, fulfills the intention. This same doctrine, with respect to dower, is recognized by this court in the case of *Griggs* v. *Smith*, 7 Halst. 22.

In this line of decisions, there are also some which exemplify the principle referred to, and whose analogy, in point of form, is quite close to the present case. Thus in *McCauley* v. *Grimes*, 2 Gill & J. 318, upon a certain person's death, it was found that part of his estate had been conveyed to his son A, and the object being to divide the estate of the father among his children, it was agreed that A should convey the land to B, who, at the same time, executed bonds, secured by a mortgage on the property, to the children, respectively, for the payment of their shares. This being done, it was held that the wife of B could claim dower in the land, only subject

to this mortgage. In this case, the intention of the parties was put into effect by means of the various instruments that were executed, and the seizin that was created, was made strictly subservient to such intention. So the decision in the case of *Moore* v. *Esty*, 5 N. H. 479, is to the effect that where a father conveyed an estate in fee to his son, who, at the same time, gave back to the father a deed for the same land, to hold for his life, and which deed contained a recital that if the grantor performed the condition of a certain bond, the grantee should not enter, it did not give the son such a seizin as entitled his wife to dower, he having died before his father. Here, again, we perceive that the seizin, so to speak, merely feeds the intention. The judgment in *Sneyd* v. *Sneyd*, 1 Atk. 441, was rendered on the ground of the same principle.

Another series of illustrations of the same doctrine will be found in the cases relating to the lien acquired by the vendor on the land sold for the purchase money. Thus, in the case of *National Bank of the Metropolis* v. *Sprague et al.*, 5 C. E. Green, 13, it was decided that such a lien would override a mechanic's lien put upon the property between the date of the contract to purchase and the execution of the conveyance and mortgage. To the same effect are the judgments in *Lamb* v. *Cannon*, 9 Vroom, 362; *Story* v. *Van Deursen*, 8 C. E. Green, 369, and *Macintosh* v. *Thurston*, 10 C. E. Green, 248. And it will be noticed that these cases were not thus decided by reason of the seventy-seventh section of the act respecting conveyances (Rev. p. 167), and which gives preference to a purchase money mortgage over previous judgments against the grantee, for the question was as to the effect of a mechanic's lien, and not as to the force of a judgment upon the rights of the vendor. Nor can there be any question that this provision of the statute just referred to is merely declaratory of the common law rule, which would undoubtedly elevate a mortgage given by the vendee to the vendor, to secure the unpaid purchase money, and executed at the time of the conveyance, above the reach of judgments then existing against such vendee. I do not find that it has ever been held, but that, to this extent, at least, the natural equity of the vendor will be respected and enforced. And yet, in such transactions, there is a momentary seizin in the vendee, between the execution of the conveyance and the execution of

the mortgage, upon which, in strict theory, if we fix our eyes upon the form and avert them from the purpose in view, the lien of then existing judgments against such vendee would fasten. That such evanescent seizins will not avail in behalf of creditors and others, in frustration of the object for which they are created, and this upon general rules, and independent of any statutory regulation, will be found fully exemplified in the following cases: *Curtis* v. *Root*, 20 Ill. 53; *Chickering* v. *Lovejoy*, 13 Mass. 51; *Clark* v. *Munroe*, 14 Id. 351; *Ahern* v. *White*, 39 Md. 409; Co. Litt. 31 b.; *Stow* v. *Tifft*, 15 Johns. 458; *Pomeroy* v. *Latting*, 15 Gray, 435.

The result thus indicated, therefore, is that upon the merits of the present case, as such merits have appeared in the pleadings and in the arguments of the respective counsel, the plaintiff has no legal claim to the ores in question.

The conclusion, however, does not entitle the defendants to a judgment on their demurrers, for their pleas are obviously insufficient. They merely show title in this zinc company, but fail to make out any connection between such corporation and these defendants. As the pleas admit that the general title to the *locus in quo* was in the plaintiff, and, from the nature of the act done by them, that they entered upon such close, they fail to justify such conduct when they set up nothing but a title in a stranger, to the ore taken by them. On the record as it stands, the plaintiff must have judgment in his favor.

BRADBURY ET AL. V. DAVIS.

(5 Colorado, 265. Supreme Court, 1880.)

Relief from fraud—Statute of limitations. Actions upon the ground of fraud must be instituted within three years after the discovery of the fraudulent acts relied upon as the ground of relief, or be forever barred.

Potentiality of quitclaim deed. A quitclaim deed is as effectual to pass the title to real estate as any other, and the purchaser accepting such deed without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty.

Adoption of statute of other State. In adopting substantially the statute of another State, the legislature is presumed to have intended that such statute shall receive the same construction given it by the courts of the State from which it was adopted.

Appeal from District Court of Custer County.

The plaintiff in the court below, Davis, had judgment.

BLACKBURN & DALE, for appellants.

GEORGE S. ADAMS, for appellee.

BECK, J.

The complaint in this case seeks relief on the ground of fraud. It alleges the formation of a mining partnership in the month of November, 1874, composed of the plaintiff, Davis, and the defendants, Feely and Ellsworth, by the terms of which partnership contract all the partners were to prospect for silver mines, and to locate and develop such as might be discovered for their joint benefit, each partner to bear an equal proportion of the expenses incurred, and each to own an equal interest in the lodes discovered. It alleges that the Tecumseh lode, on Game Ridge, Fremont county (now Custer county), was discovered by defendant Ellsworth during the existence of the partnership arrangement, and that it was staked in the names and as the property of all the partners, but that afterward the defendants Feely and Ellsworth, conspiring to defraud the plaintiff out of his interest therein, destroyed the location stakes, and then staked and located it in the name of Feely alone. That Feely conveyed one fourth of the lode to Ellsworth, and that Ellsworth and Feely, by separate conveyances, thereafter conveyed the entire lode to the other defendants. The complaint charges that all the conveyances were made and accepted in fraud of the rights of the plaintiff; that the purchasers had full knowledge of his rights, and that the pretended conveyances given and accepted were deeds of quitclaim.

The prayer of the complaint is that the plaintiff be adjudged to be the rightful owner of an undivided one third interest, share and part in the mine; that the parties holding the legal title to the property be ordered to convey to him;

also that the parties in control of the mine be required to account for the ore mined and sold; likewise a prayer for further relief. All the defendants, except Austin, interposed as a bar to the action, pleas of the statute of limitation.

The statute relied upon (section 1682, General Laws, 1877) provides that "bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterward."

Upon the trial the appellants requested the court to give to the jury the following instruction, which was refused: "The court instructs the jury that if they believe from the evidence that Davis discovered the facts constituting the fraud he (Davis) complains of in this action, to wit, the location of the Tecumseh mine on Game Ridge, in the name of Feely alone; the sale of half thereof to the Bradburys; the sale of one fourth thereof to Ellsworth; and Ellsworth's sale of one fourth thereof to Reed, more than three years prior to March 20, 1879, then the claim and action of Davis, plaintiff, is barred by the statute of limitations, and they (jury) must find for the defendant."

The record shows that Davis discovered the alleged fraud of destroying the location stake and the restaking of the lode in the name of Feely, as early as February, 1875; it discloses the fact that the conveyances to all of the defendants, except the defendant Austin, were made prior to the year 1876. The complaint was filed in the District Court March 20, 1879; the plaintiff admits that Bradbury told him in December, 1874, or January, 1875, that he had an interest or a half interest in the mine, and that Reed informed him in the spring of 1875, of his purchase of an interest therein; also that Ellsworth told him, in the fall of 1874, that he and Feely had concluded to keep the mine themselves. Davis, then, had full knowledge of all the fraudulent acts complained of, and upon which he relies for equitable relief, with the single exception of the sale to Austin, more than three years prior to the filing of his complaint.

This being the state of the evidence, the instruction referred to was pertinent to the case presented by the pleadings and the testimony. It should have been modified, perhaps, so as

to have specifically excluded from its operation the defendant, Austin, as to whom the statute of limitations was not pleaded. The statute relied upon by the appellants clearly applies to cases of this character. Fraud is the substantive cause of action, and the policy of the law is that actions of this nature shall be instituted within three years after the discovery of the fraudulent acts relied upon as the ground of relief, or be forever barred: *Pipe* v. *Smith*,[1] decided at present term; *Sublette* v. *Tinney*, 9 Cal. 423; *Carpentier* v. *The City of Oakland*, 30 Cal. 439.

A question arose upon the trial as to the effect of the quitclaim deeds executed by the defendants, Feely and Ellsworth, to the other defendants. Counsel for the appellee contended that a purchaser accepting such a deed is chargeable with notice of all outstanding equities, although the same do not appear of record, and the purchaser had not actual notice thereof. This theory was adopted by the court below in its instructions to the jury, and error has been assigned upon these instructions.

The substance of the third, fourth and fifth instructions, given at the request of the appellee, is that if the jury find that the purchasers accepted quitclaim deeds, such deeds were insufficient to convey the equitable interest of the plaintiff, and his rights under and by virtue of the partnership agreement to an undivided one third part of the mine did not pass thereby.

These instructions practically informed the jury that it was not necessary that the defendants should have notice of these equitable rights in order to produce such a result, since the form of the conveyances operated as constructive notice of the plaintiff's equities.

We are of opinion that these instructions misconstrue the law of this State, both as to the effect of an ordinary quitclaim deed, and upon the subject of notice.

The form and effect of deeds, as well as what shall be deemed to constitute notice of the execution thereof, are matters which may be, and frequently are, regulated by statute. In such case, to ascertain the effect of a particular conveyance, involves an interpretation of the statute under which it

[1] 5 Colo. 146.

was executed, rather than an inquiry what rights would pass by such a deed at common law or by the statutes of uses.

The provisions of our statute relating to the form, force and effect of instruments for the conveyance of real estate, were largely transcribed and adopted from the statutes of Illinois. Those statutes adopted a different policy from that which anciently prevailed in respect to the distinctions between the different forms of conveyance, and made the effect of a deed to depend rather upon the intentions of the parties, than upon the form of the deed. They also required all conveyances of real estate to be recorded in the county in which the land lay, and declared them void if not so recorded, as against subsequent purchasers and incumbrancers without notice.

A junior deed, if first recorded, has priority over a deed of older date subsequently recorded, unless the grantee in the later conveyance had notice of the prior unrecorded deed. The same provisions substantially were incorporated into our own statute.

The Supreme Court of Illinois, in construing these statutory provisions, has decided that a quitclaim deed is as effectual to pass the title to real estate as any other, and that the purchaser accepting such deed, without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty, except where it appears from the conveyance itself that it was not the intention of the vendor to convey the land in controversy: *McConnel* v. *Reed*, 4 Scam. 117; *Butterfield* v. *Smith*. 11 Ill. 485; *Brady* v. *Spurck*, 27 Ill. 482; *Morgan* v. *Clayton*, 61 Ill. 35.

These decisions are expressive of the plain import of these sections of our statute. The rule of construction therefore applies, that in adopting substantially the statute of another State, the legislature is presumed to have intended that such statute shall receive the same construction given it by the courts of the State from which it was adopted.

This being our view of the construction to be given the statute, it becomes unnecessary to review the other line of authorities cited concerning the effect to be accorded to such instruments of conveyance. They appear to be based on dissimilar statutory provisions in so far as they are variant from the construction here adopted; consequently such decisions can not aid in the interpretation of our statute.

It is unnecessary to consider the other errors assigned, save to observe that the form of the decree is objectionable in granting legal relief instead of the equitable relief prayed for in the complaint.

For the errors mentioned the judgment must be reversed and the cause remanded.

Reversed.

PETITION FOR REHEARING.

(5 Colorado, 341.)

The petitioner asks for a rehearing, on the ground that the court took an erroneous view of the case in basing its decision as to the statutory bar upon the assumption that the complainant in the court below sought relief on the ground of fraud. It is insisted that the action was in its nature *ex contractu;* that the allegations of fraud were pleaded as mere matter of inducement, and that the plaintiff's right to recover, if he had such right, arose out of a vested right which he had in the property in controversy by virtue of the copartnership between him and the two defendants, Feely and Ellsworth.

We think it is a sufficient answer to this ground of the petition to say that the property having been, prior to the suit, conveyed by Feely and Ellsworth to Bradbury and the other defendants, the relief asked in the complaint was against these latter defendants, as grantees of the property, who certainly were not parties nor privy to any contract with plaintiff.

The real ground of relief as set out in the complaint, was the conveyances of Feely and Ellsworth, made in fraud of the rights of the plaintiff as a copartner with them in the first staking of the mining claim. That right was in the partnership and in whatever property the partners should acquire title to thereby.

The title to the property in question was in Feely and Ellsworth at the time of their conveyance by reason of their

location of it in their own names sufficient to pass it to their grantees without other notice than the deeds themselves.

The character of these deeds and their legal effect in passing title are sufficiently discussed in the opinion in chief, and in the absence of other authority against the views therein expressed, need not be further noticed here. The petition for rehearing will be denied.

Petition denied.

ROSS ET AL. v. HEATHCOCK ET AL.

(52 Wisconsin, 557; 9 N. W. Rep. 609. Supreme Court, 1881.)

[1] **Specific, controls general, description.** A deed, conveying lands, or at least the right to mine the ores therein, describing the lands by government subdivisions following the number of the quarter sections with the words, "and known as the Heathcock range" does not give the grantees the right to mine upon another subdivision owned by the grantors, to which the Heathcock range was afterward found to extend.

Construction of special contracts. The other leases and instruments described in the opinion *construed* not to cover the ore in the land in dispute.

Proof to supersede written contract. A verbal arrangement or contract may be proved superseding previous written agreement, but it must be established clearly and not by loose and vague testimony.

Appeals from the Circuit Court, Iowa county.

HENRY & SMITH, LANGAN & SPENSLEY, P. A. ORTON, and MOSES M. STRONG, for plaintiffs.

JOHN W. TAYLOR, BARBER & CLEMENTSON, and WILSON & MCILHOSE, for appellants.

COLE, C. J.

These are cross-appeals from portions of the same judgment. The important and controlling question arising on both appeals relates to the plaintiffs' claim to follow or mine upon the "Heathcock range," as it is called, on the N. E. ¼ of the N. W. ¼ of section 17. The learned Cir-

[1] *Dexter Co.* v. *Dexter Co.*, 6 R. I. 351, *Post* DESCRIPTION; *Weill* v. *Lucerne Co.*, 3 M. R. 373.

cuit Court affirmed their exclusive right to mine upon that range on this 40-acre tract, and enjoined the defendants from mining on the same, or from interfering in any manner with the plaintiffs while in the exercise of that right, so long as they should pay the rent specified in the judgment. The correctness of this decision is the matter to be considered.

The first inquiry will be directed to the plaintiffs' right thus to mine on this tract, as based on or established by the documentary evidence offered on the trial. One of the learned counsel, in an able argument which he addressed us on this point, insisted that the paper title of the plaintiffs, as shown upon the trial, established in them a perfect equitable title, with the exclusive right of possession, and the right to have vested in them the legal title, as against the defendants, to the Heathcock range on this disputed tract. It will be most favorable to the plaintiffs' case to assume, as we shall do without discussion, that all the right to work or mine this range on this tract, which the defendants by any contract, either oral or written, gave to any party under whom the plaintiffs' claim has become vested in them. It may as well be remarked here as anywhere, that it appears one Michael Poad, owned an undivided one third of all the ores in the N. W. ¼ of the N. E. ¼ of section 17, the S. W. ¼ of the S. E. ¼, the S. E. ¼ of the S. W. ¼, and about 26 acres on the east side of the S. W. ¼ of the S. W. ¼ of section 8,—all the above lands being in town 5, range 2 E.; also he may have had an interest in the ores in the disputed tract; and while he did not sign some of the contracts which were executed by the Heathcocks, no question is made but that he is equally bound with them in any transfer or sale of the right to mine upon these tracts. We do not deem it material to inquire as to who was the real legal or equitable owner of any of the lands, as it is only the right to mine upon the same with which we are concerned.

The first instrument relied on by the plaintiffs to establish their right to mine on the Heathcock range on the disputed tract is the written lease bearing date July 21, 1853, made and entered into between the defendants Heathcock of the first part, and Bracken and Vivian of the second part. By this lease in consideration that Bracken and Vivian and their

assigns would perform certain conditions named and pay the mineral rents covenanted to be paid, the Heathcocks demised and granted to them for the term of twenty-one years, with a covenant to renew for another like term at the election of the lessees, "for the uses and purposes of digging and mining for copper, lead, and other ores, and for any and all other purposes incident to mining and smelting or manufacturing any of said ores," the lands therein specified, describing them by government subdivisions. The lease does not include the disputed 40. At the time this lease was given it appears that a range of mineral had been discovered and worked in many places to the water, the west end of which, so far as developed, was in the S. W. ¼ of the S. W. ¼ of section 8, near the north line of the said quarter quarter section, and the lineal course of the said range was easterly, bearing to the south, and running in a curvilineal direction south of east entirely across the S. E. ¼ of the S. W. ¼ of section 8 crossing the east line thereof near the center of it, and running into the S. W. ¼ of the S. E. ¼ of section 8, and into the N. W. ¼ of the N. E. ¼ of section 17, but had not been worked or traced into the disputed 40. The Linden Mining and Smelting Company was organized, which entered into the possession of the lands under this lease; commenced and prosecuted extensive mining operations thereon, by putting on machinery for drawing off or removing the water from the range below the second layer of magnesian limestone; took out a large quantity of ore, and paid the mineral rent agreed to be paid the lessors.

On the first of January, 1855, what is known as the "water wheel lease" was executed, in and by which the Heathcocks gave the company the right and privilege of digging, "constructing, and maintaining a dam, open cut, water-table, or water-course through so much and such portion of the N. E. ¼ of the N. W. ¼ of section 17 * * as may be necessary to direct and change the course of the branch stream or rivulet now running and passing through the above described land, so as to enable the" company to propel and supply with water and operate a water wheel, etc. There is no right given to mine upon the above tract in this lease, and it is not seriously claimed that any such right was granted by it. The next instrument was the adit lease of June 5, 1857,

wherein the Heathcocks granted the company the right or privilege of running or keeping open an adit or level on the disputed 40, "commencing where the present adit is opened on the west side of the tail-race, and running up the bottom toward the Heathcock range"; also the right and privilege of sinking the necessary shafts to run said adit or level, and of following and digging after any mineral, that the company might discover in running said adit, or sinking said shafts, "*but not to follow such mineral further east than where said adit or level commences*," on condition that the company paid the rents specified therein. In the original complaint the right to follow and mine upon the Heathcock range on the disputed 40 was based entirely upon this lease, and in the amended complaint the same claim is asserted, founded on this lease and other grounds.

On the thirteenth day of July, 1859, the Heathcocks entered into a contract to convey to the company all their right, title, and interest to the following tracts, described as the S. W. ¼ of the S. W. ¼, the S. E. ¼ of the S. W. ¼, and the S. W. ¼ of the S. E. ¼ of section 8, the N. W. ¼ of the N. E. ¼ of section 17, being in town No. 5, etc., "*and known as the Heathcock range*," to have and to hold the above premises for the uses and purposes of mining and digging for lead, etc., and for any and all other purposes incident to mining and smelting said ores, upon condition that the company pay, on or before the first day of January following, the sum of $14,000. On the seventeenth of December thereafter a deed was executed under this agreement by the Heathcocks, conveying the undivided two thirds of all mines and ores in certain tracts, which, with two exceptions, are described according to the government subdivisions, omitting the disputed 40, and not in terms conveying what is "known as the Heathcock range," for $12,000.

This is the substance of the various written instruments constituting the documentary evidence which is relied on to show that the defendants have granted the right to mine the Heathcock range on the disputed 40 to parties under whom the plaintiffs claim; and the question is, do they sustain the position of the learned counsel on this branch of the case? It seems to us they do not. It will be noticed that wherever

the right to dig or mine upon this disputed 40 is expressly given, that right is clearly restricted and defined. The water-wheel lease plainly states the privilege intended to be granted by it. No privilege to mine is there given. The object of the adit lease is just as plainly stated; and while it grants the right to mine upon that 40, yet that right is restricted in terms to the privilege of following such mineral as might be discovered in mining the adit or sinking the shafts upon ground west of the point where the adit commenced. It is said it was not the object of the restrictive language in the lease—"not to follow such mineral further east than where said adit commences," etc.—to prohibit the company from following the Heathcock range into this tract from the north or east sides thereof should the range be traced into the tract from either direction. But that view is so utterly at variance with the plain intent and meaning of the instrument that it seems to us it can not for a moment be entertained. There is no ambiguity in the language used—no uncertainty as to the privilege granted or right denied; and to hold, in view of the restrictive clause, that the lease gave the company the right to follow the Heathcock range into the disputed 40, from an adjoining 40 on the north or east, is a construction wholly unwarranted. We therefore feel justified in assuming that if the right was given by any written contract to follow the Heathcock range onto this 40, it must be found in some other instrument executed by the defendants.

This brings us to the contract of July, 1859, upon which the learned counsel mainly relies to maintain that right. The first remark which we make on this contract is that the disputed party is entirely omitted from it. For a consideration named, the defendants agreed to convey to the company, for the purpose of mining and digging for mineral thereon, certain described tracts of land. After the tracts are described by government subdivisions, the words "and known as the Heathcock range" are added. The learned counsel says these words do not restrict the lands to be conveyed to so much of that which is known as the Heathcock range as fulfills the other conditions of the description; in other words, if the Heathcock range was subsequently traced or developed on other lands owned by the defendants than those described in

the contract, that the defendants bound themselves to convey such lands, or allow the company to mine such range on them free from rent. We are unable to concur in that view. There is really no difficulty in ascertaining the lands which the defendants agreed to convey by the contract. The description by government subdivisions renders it perfectly clear and certain what they were. Nor is there any necessity for rejecting anything in the descriptive part of the contract. The Heathcock range, as it was then known, existed on the precise parcels agreed to be conveyed.

There is, therefore, nothing inconsistent in the description, nothing repugnant in the several particulars included in such description, which must be rejected. Full effect will be given to every part of the contract when the tracts described were conveyed upon which the Heathcock range as it had then been worked and developed, existed. The parts of the description are consistent, and there is really no room for interpretation or construction in order to ascertain what lands the parties intended to give the right of mining upon. But it is said that if the contract is read as it should be, in the light of surrounding circumstances, it will be seen that the parties intended by the contract on the one hand to sell and on the other to purchase, the Heathcock range wherever it might run on the defendants' lands, and not simply the mineral ores within the particular tract of land described in the contract; that the principal thing sold, the real subject-matter of the contract, was the Heathcock range, and that the lands specified were those upon which the range was supposed by the parties to be located. The rule is elementary that a written contract "may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contra-distinguished from what their words express, but what is the meaning of the words they have used": 1 Greenleaf Ev. § 277.

Bearing in mind this familiar rule in construing this contract, we are unable to say that the defendants are bound by

its terms to convey any land not mentioned in it, even though the Heathcock range may run thereon; for they did not agree to convey all the lands owned by them upon which that range should be tracted, but only the specific tracts mentioned. It seems to us plain that this is the extent of their obligation. Certainly the fact is established by abundant proof, that when the contract and deed of December, 1859, were executed, no one supposed that the Heathcock range would be traced onto the disputed 40. And it is frankly admitted that at this time all were mistaken as to its course; that it is so very peculiar and eccentric in its formation, that no one expected it would enter this tract, until years after all the contracts relating to the mining right were made. But still, this fact can not essentially affect the question as to the proper meaning of these contracts. They must be construed according to the language used, and by that language it is obvious to our minds that the defendants only engaged to convey what in fact they did convey, the right to mine upon certain specified tracts of land upon which the Heathcock range was known to exist, and no other. If other ranges or crevices of mineral besides the Heathcock range shall be discovered on these lands, the plaintiffs will have the undoubted right to all the mineral therein, because they have not alone purchased the Heathcock range thereon, but all other ranges. But we think we should be doing great violence to the language used, were we to hold that the words "known as the Heathcock range" so enlarged the grant as to give the plaintiffs the right to follow that range on the disputed 40.

There is an averment in the amended complaint that this 40, through some inadvertence or mistake, was omitted from the contract in question, but the evidence is perfectly clear and decisive that it never was intended to be embraced therein. Certainly there is no ground for claiming that in reducing the contract to writing the parties failed to include this tract with the other tracts upon which the right to mine was given, for it appears there was no intention to include it specifically in the contract. Unless the language, "Heathcock range," covered it, it was surely no part of the thing granted in this contract. But, for reasons already given, we think those words gave no right to mine on any tracts not described in the in-

strument. Really, the only mistake which is shown to have existed when the contract was made, was as to the course of the Heathcock range. In regard to that matter, all parties, confessedly, were mistaken; but they had equal opportunities for ascertaining the facts, and the same means of information for forming a judgment as to its probable direction. If, in working the range, it has been forced to enter a tract which no one, until shortly before this suit was commenced, supposed it would enter, and on which only a restricted right was given by the written agreements, this furnishes no reason for reforming the contract on the ground of mistake. The plaintiffs are not disturbed in the enjoyment of any mining right which they acquired by the written contracts; they have the right to mine upon all the tracts described; therefore show no legal or equitable right to follow the Heathcock range on a 40 not embraced in their contract or deed. This is all we deem it necessary to say in respect to the plaintiffs' right to mine on the disputed 40 as founded on the paper title.

But in the amended complaint it is alleged that some time in the summer of 1854 the defendants, for the consideration of $6,000, by either a verbal or written contract, gave the Linden company the right of following, digging, raising and removing all ores which might be found in the Heathcock range, or pertain thereto, wheresoever such might be, on any land owned by them or either of them. The learned Circuit Court found that such a contract was made, by which the defendants and Poad sold to Bracken and Vivian and their assigns, as a distinct property interest separate from the ownership of the land, and separate from the mineral rent to be paid them as owners of the land, the exclusive right to work the Heathcock range, or to mine thereon to the full extent that the vendors had the right to pursue and work the same at the time of sale. A very able and elaborate argument was made by one of the plaintiffs' counsel in support of this finding of the court below. We have carefully examined all the evidence contained in the two printed cases furnished, and fail to find the proof of such a contract of sale. We have already referred to all the documentary evidence introduced on the trial which relates to the mining right sold or granted by the defendants. It is needless to remark that this new

and distinct contract is not contained in any of it. Nor does it appear that any written contract entered into between the parties relating to the sale of the Heathcock range, or the right to mine on the same, has been lost. Notwithstanding this documentary evidence, which shows that the parties entered into several written contracts, in which their rights and obligations were clearly defined and limited,—contracts, too, about this very subject-matter of mining on the defendants' land,—still it is not impossible that the parties made some other agreement in regard to the sale of the Heathcock range, distinct and independent from these contracts, though under the circumstances the presumption is very strong against their having made any such agreement. At all events, the burden was upon the plaintiffs to show, by clear and satisfactory evidence, that such an agreement was actually made, and its terms and conditions. Have they done this? It seems to us they have not.

The court below distinctly negatived the plaintiffs' right to follow the Heathcock range on the disputed 40, either under the adit lease, the contract of July 13, 1859, or the deed of December, 1859; but did find as a fact established by the evidence that the defendants and Poad, in consideration of $6,000 in money, or its equivalent, sold to the company the exclusive right to work that range to the full extent that the vendors had the right to pursue and work it at the time of sale. We have carefully examined the testimony for the proof which will support this finding. Of course, the existence of such a contract of sale must be shown by competent and sufficient testimony. It can not be inferred from mere vague, doubtful, and ambiguous declarations or circumstances which do not amount to positive proof of an express contract. There is certainly testimony in the case which shows that the defendants and Poad were paid $6,000 for something, mostly in stock of the company. But what this money and stock were paid for does not clearly appear. There is evidence that it was given as a bonus for the Bracken and Vivian lease. That lease refers to a certain bond bearing even date therewith, the condition of which the obligors bound themselves to keep and perform. The bond is lost. No one is able to state what its real condition was,—whether it was for the payment of

money, or for doing other things. There is likewise evidence of admissions made by the defendants to the effect that the company had the right to follow their mineral or range on any land owned by them. We shall not attempt to discuss the oral testimony which is relied on for the purpose of proving that the defendants, for a valuable consideration, sold by a verbal agreement—independent of the written contracts—the right to work the Heathcock range wheresoever the same might run on any land owned by them.

It seems to us that all the evidence bearing upon that point is entirely inadequate and insufficient to justify the inference that such a verbal agreement was made. We have already referred to the strong presumption arising from the written contracts against the existence of such a verbal agreement. It appears that the parties deliberately put their other engagements and contracts in writing. It is difficult to believe that they would allow so important an agreement respecting a mining right sold and purchased to rest in parol. Besides, no witness could testify that the parties ever actually entered into such an agreement, or could state its conditions and when it was made. The loose and inconsiderate admissions proven, and the probabilities arising from the conduct of the parties which were relied upon to establish the contract, we deem insufficient to prove its existence. It is true the jury to whom the question was submitted distinctly found a sale of the right to work the Heathcock range, as claimed, and the court affirmed the correctness of the verdict in that particular, as we have said. And the learned and able counsel for the plaintiffs, on this branch of the case, invoked the aid of the well-settled rule that this court will not disturb a verdict of the jury or the finding of a court on a question of fact, except where the preponderance of evidence is most clearly against it. We do not intend to come in conflict with that rule. This is an equity case, and this court must review the evidence and determine what facts it establishes. But were the case one at law, we should feel constrained to say that there was no sufficient evidence of such a contract to warrant the verdict of the jury. The circumstances, admissions, and all matters relied on to prove the sale and purchase of such a valuable mining right, in our opinion, fall far short of the

degree or quantity of evidence essential to warrant an inference that it was made.

The court also submitted this question to the jury, to wit: "If the owner of a discovery right, or right to work a mine or range of mineral, sells his working right for a valuable consideration to the entire range, as far as the seller has the right to pursue and work the mine, agreeably to the custom of miners in this section of the country in force at the time of sale, say in 1853 or 1854, can the seller, under any pretext, set up a valid claim to work any portion of the range by him sold, against the will of the purchaser, or his assigns, their working right acquired by the purchase not having been forfeited? The jury answered this question in the negative. There was considerable testimony taken in regard to the custom and usages of miners, but we think neither such testimony, nor the above question, was pertinent to the case. We have said that in our judgment there was no evidence which would justify a jury in finding that the defendants, for a valuable consideration, sold the working right to the entire Heathcock range, wheresoever it might run on lands owned by them. What was sold was the right to and interest in all the ores and minerals on certain specified tracts of lands, together with the right of digging and working on such lands for mining purposes. The Heathcock range as far as the defendants had the right to work it, was not the thing sold and purchased. The right to work that range on the specified tracts was sold, but not the right to follow it upon land not embraced in the contract. Consequently, we deem the question inapplicable to the case on trial. We decide nothing as to the effect of an established mining custom on such a hypothetical case as that stated in the question. Without further remarks we will say, the conclusion which we have reached is that that portion of the judgment appealed from by the defendants must be reversed, and the cause be remanded, with directions to dismiss the complaint.

This view necessarily disposes of the appeal of the plaintiffs, since the very foundation of that portion of the judgment which they appeal from is gone or destroyed; for really the vital parts of the judgment are reversed on the defendant's ap-

peal. And because there is nothing left for the plaintiffs' appeal to operate on it must be dismissed.

It is so ordered.

1. Attempted conveyance although void may pass title when accompanied by transfer of possession—operating as an abandonment by the vendor with an appropriation by the vendee: *Barkley* v. *Tieleke*, 2 Mont. 59; *Post* DITCH.

2. A quitclaim deed will pass title against warranty deed of prior date not recorded: *Brown* v. *Banner Co.*, 97 Ill. 214.

3. Void reservation of mines in deed of tenant in common: *Adam* v. *Briggs Co.*, 7 Cush. 361; *Post* SEVERANCE.

4. Conveyance of certain ores, reserving other ores out of same mine: *New Jersey Co.* v. *Boston Co.*, 15 N. J. Eq. 418.

5. A deed referring to a location certificate for description of the lode conveyed is a conveyance by the metes and bounds contained in the location certificate: *Harris* v. *Equator Co.*, 3 McCrary, 14, 2 Col. L. R. 63; *Post* POSSESSION.

6. Conveyance of right to use side track of railroad to quarries, construed to carry same use of new track as relaid on different bed: *Fellows* v. *Webb*, 43 Iowa, 133.

7. "The right of digging for coal" construed in a deed to carry the exclusive property in the coal to the grantee: *List* v. *Cotts*, 4 W. Va. 543.

8. The right to buy and to sell is inherent in a corporation and its conveyance under its seal signed by the proper officers is *prima facie* evidence of a proper and authorized conveyance: *Miners Co.* v. *Zellerbach*, 37 Cal. 544; *Evans* v. *Lee*, 11 Nev. 194.

9. Evidence by admissions of corporate officers: *Hillyer* v. *Overman Co.*, 3 M. R. 44.

10. Deed concluding with "witness the signature and seal of William Scott, President," reciting the name of the company and its authorization to Scott, with scroll attached, *held*, not a deed of the corporation: *Rauch* v. *Oil Co.*, 8 W. Va. 36.

11. Construction of Michigan statute of 1875 to perfect informal corporate deeds: *Marquette Co.* v. *Atkinson*, 44 Mich. 166.

12. One seal good for all the grantors: *Lunsford* v. *La Motte Co.*, 54 Mo. 426; *Post* LICENSE.

13. Purchaser under deed takes notice of visible servitudes: *Oregon Co.* v. *Trullenger*, 3 Oreg. 1; *Post* DAM.

14. Mining claims may be transferred in California by verbal sale, with delivery of possession: *Antoine Co.* v. *Ridge Co.*, 23 Cal. 219; *Post* MEASURE OF DAMAGES; *Jackson* v. *Feather Co.*, 14 Cal. 19; *Post* EVIDENCE; *Table Co.* v. *Stranahan*, 20 Cal. 198; *Post* LOCATION; but *contra* as to water right: *McCarron* v. *O'Connell*, 7 Cal. 152; *Post* TRESPASS. Verbal sale is not sufficient since statute of 1860: *Patterson* v. *Keystone Co.* 30 Cal. 360; *Post* SALE; *Goller* v. *Fett*, 30 Cal. 484; *Post* PARTIES; *King* v. *Randlett*, 33 Cal. 318; *Post* EVIDENCE; *Felger* v. *Coward*, 35 Cal. 650; *Post* EJECTMENT; *Melton* v. *Lambard*, 51 Cal. 258; *Post* VENDOR AND PURCHASER.

GRUBB'S APPEAL.

(66 Pennsylvania State, 117. Supreme Court, 1870.)

[1] **Real estate, not partnership property.** Parties owned ore-land as tenants in common; they entered into partnership in manufacturing iron and bought other real estate. The proceeds from the land and the purchase money of the real estate were carried into the firm books with the partnership transactions. *Held*, that these circumstances did not make the land and the proceeds firm property.

Interest not allowed after laches. Each party used the ore without requiring the other to account and there was no known excess to be paid for as the business progressed. Being a voluntary delay of both, interest was properly chargeable only from the time the balance was struck.

Contract not running with land. C., one partner, contracted to sell ore from the common property to H., for a particular furnace, to be paid for in iron from that furnace, E., the other party, declining to join. E. and P. afterward bought H.'s furnace, so that he could not furnish iron. *Held*, that the contract with H. did not run with the land, and E., after the purchase, was not responsible to C. on the contract.

Want of privity. E. gave indemnity to H. against damages to C. for failing to fulfill his contract. *Held*, that this created no liability on E. to C. on account of H.'s contract. The indemnity created no privity between E. and C.

Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ.

In the matter of the accounts of Edward B. Grubb and Clement B. Grubb, trading as E. & C. B. Grubb, *sur* exceptions to the report of the master appointed by the Supreme Court in appeals from the decrees of the Court of Common Pleas of Lancaster County; in Equity: No. 49 and 74, to May term, 1869.

On the 1st of August, 1860, a bill was filed by Edward B. Grubb against Clement B. Grubb; the plaintiff having died, E. Burd Grubb, his administrator, was substituted.

The bill set out that H. B. Grubb died intestate, seized of several tracts of land in the counties of Lebanon, Dauphin, Lancaster and York, including one sixth of the Cornwall ore-banks in Lebanon county and the right to dig and carry away

[1] For instances where mines were treated as a partnership fund, see *Duryea* v. *Burt*, 28 Cal. 569; *Post* PARTNER; *West Hickory Co.* v. *Reed*, 80 Pa. St. 38.

ore from lands adjoining the banks, and the right to all the ore in the Chestnut Hill ore-bank, in Lancaster county; on this real estate there were a furnace and two forges; that H. B. Grubb left to survive him a widow and seven children, amongst whom were the plaintiff and defendant, and that under proceedings in partition in 1836, the real estate, including the ore-rights, was adjudged at the valuation of $175,000 to the plaintiff and defendant, who entered into partnership in mining ore and manufacturing and selling iron, and brought the whole of the real estate into partnership, which continued till 1855 when it was dissolved by the defendant; that the interest and part of the shares of the widow and heirs of H. B. Grubb were paid by partnership funds; that with partnership funds the firm erected three other furnaces and for partnership purposes they purchased the fee of the Chestnut Hill ore-bank; that their interest in the Cornwall and Chestnut Hill ore-banks, and all the other real estate had always been held in partnership, and they had worked the ore-banks for partnership purposes and with partnership funds, employed agents, kept books of account, amounting to not less than $2,000,000, and no account had been settled between them; that plaintiff had on some occasions sold iron in his own name, but always for the firm, and had always been ready to account for that as ore taken for his separate use; that the defendant claimed the right to take ore for his exclusive benefit, and had sold ore and made contracts for sale, and pretends that by accounting for the ore at a price less than its value, and than he received for it, he is entitled to the profit of its sale for his own use, and refuses to allow the firm or the plaintiff to participate in the profit, and would not account; that in 1853 the defendant erected a furnace near the Chesnut Hill bank, and had since taken ore to supply it from that bank, and although the ore thus taken by the defendant had, up to the dissolution in 1855, been mined at the expense of the firm, the defendant refused to account for it except as above stated; that the defendant in 1855 gave notice that he dissolved the firm, but the ore-banks and other property were undivided, and he continued to use and sell the ore for his own benefit without accounting for it; that under a bill filed by R. W. Coleman for an account of ore taken from Cornwall banks, a decree had been made against the other

owners for an account at the market value, by which the interests of the plaintiff and defendant therein were made a unit, and the plaintiff was jointly chargeable with ore taken by the defendant, but the defendant would not allow the plaintiff any of the ore taken by him, or the proceeds, nor make any settlement; that there remained charged on the real estate and ore-banks $30,000 unpaid purchase money and the balance of the share of one of the heirs; that judgments were obtained, and the real estate about to be sold, and although the liabilities could be paid out of the property, and the defendant, because of his indebtedness to the plaintiff in a larger amount, should have paid the whole, the plaintiff consented to make an arrangement with the defendant to pay the liabilities and raised his own share, when the defendant refused to carry out the arrangement; that the liens were transferred to Brooke & Coates (Brooke being a brother-in-law of the defendant) who demanded that the plaintiff should pay one half of the liens from his separate estate, or else they would sell property no longer belonging to the defendant; that there were other debts of the firm for which judgments had been obtained, and although the defendant had consented that one tract should be sold in separate parts to pay these debts, he afterward refused to have it sold except as a whole, which would be equivalent to preventing a sale except at a great sacrifice; that the plaintiff was about effecting an arrangement by which the debts would be speedily paid by the sale of ore, but the defendant claiming a right to take as much ore as he wanted for his own furnace, and to pay the lien of Brooke & Coates, forbade the plaintiff's miners to mine; that the arrangement with Brooke & Coates was for the defendant's benefit, and should not deprive the plaintiff of the use of the mines or of his equity of paying joint debts from joint property; that the defendant had induced parties who had agreed to take ore from the plaintiff to make contracts with the defendant alone, and would claim as he had done since 1853; that such sales were for his exclusive benefit, and he was not bound to account for the profits; that the non-payment of the firm-debts had injured plaintiff and impaired his credit; that the estate of the firm, although of immense value, is liable to be sold for their debts, all of which could be paid by the profits arising

from the property, or a sale of part of it, or by payment of the balance due by defendant; that no final settlement has been made, that upon such a settlement a large balance would appear to be due by the defendant, who refused to make a fair account of ore taken by him or settlement of the partnership transactions, and refusing to provide for payment of the debts, continued to use and sell the ore for his own benefit to the loss of the plaintiff and risk of his estate and property.

The prayers were—

1. For an account of ore taken from Cornwall and Chestnut Hill, and decree of payment of what might be due plaintiff.
2. For an account of the partnership transactions and payment to plaintiff.
3. For a receiver.
4. For partition, and in the meantime an injunction against the defendant from using and selling ore.
5. General relief.

By his answer filed April 2, 1860, the defendant averred that the real estate was adjudged to him and the plaintiff as tenants in common, and had so continued; the partnership was carried on at Mount Hope, Mount Vernon, Manada and Codorus furnaces; he denied that it was part of the business of the firm to mine ore for sale, or that the firm was ever engaged in selling ore; the firm continued in active operation till 1841, when they ceased at Manada and Mount Hope; they leased Manada as tenants in common; in 1843 they ceased at Mount Vernon, which they leased as tenants in common; the defendant conducted Mount Hope on his own account from 1841 to 1844, when he sold his interest as tenant in common in it to his brother, A. B. Grubb; in 1847 he sold his interest in Mount Vernon to the same brother, who transferred his interest in the valuation money payable on the death of their mother; the plaintiff since 1841 had resided in New Jersey; in 1849 the firm ceased business at Codorus, and their affairs were entirely closed by R. N. Arms, their agent for that purpose, and the business of the firm ended; with an exception to be mentioned; the payments of the valuation out of firm funds were made for convenience only, not because of any firm interest in the real estate; this was proposed and understood by plaintiff; the entries relative to the real estate were made in the firm books for convenience, not to introduce

the real estate as part of the assets; all deeds to and from them treated them as tenants in common; the real estate was never treated or regarded nor was it partnership property; since 1843 all payments of valuation money were from their separate funds, resulting from the sale and leases of their common property, and other individual resources; sales of ore were made by each party in his own right as tenant in common and not as partner; no entries of such sales had been made since 1851 (when the business of the firm ended), in the firm books, which since then have been in the plaintiff's possession; the only operation of the firm since 1849 was an agreement in September, 1851, between the defendant and the firm, by its agent R. N. Arms, with the consent of the plaintiff, by which the firm was to raise, sell and deliver to the defendant all the ore he might want at Henry Clay furnace until April 1, 1853, under a contract with John Haldeman; the agreement was verbally extended until October, 1853, when the plaintiff having acted in a manner hostile to defendant's interest, he notified plaintiff of his determination to dissolve the partnership, and it was dissolved October 1, 1853; defendant denied indebtedness to the plaintiff on the firm account or any other, but believed plaintiff was indebted to him; since October, 1853, each had taken ore from the premises as tenant in common, for which each was liable to the other.

The defendant alleged that in 1851 the price of iron was depressed, and he believing it would advance and to make the lands profitable, entered into contracts to continue for some years to avail himself of the anticipated rise in the price of iron, the ore under the contracts to be paid for in pig-iron at specified prices; one of the contracts was in 1851, with John Haldeman, for a supply to the Henry Clay furnace for five years at $6.50 per ton of the iron made, to be paid for by pig-iron at $16 per ton, Haldeman to make at least 2,000 tons per annum. After solicitation to the plaintiff to unite in this contract and he had refused, for the purpose of fixing the price of the ore between the plaintiff and defendant, and as the firm had the necessary apparatus for raising the ore, it was agreed that the firm, through R. N. Arms, agent, should raise and deliver to the defendant, from September 23, 1851, to April 1, 1853, all the ore he wanted for his furnace—Chestnut Hill ore at $1.50 per ton,

and the defendant might take ore from Cornwall at $1 per ton; that defendant so received ore and delivered it to the furnace until October 5, 1853, and Haldeman, till June 1, 1853, delivered manufactured iron to the defendant. In July, 1853, the price of iron having advanced, the plaintiff asked to participate in the profits of the contract, and the defendant declining, plaintiff purchased one half of the Henry Clay furnace, and entered into partnership with P. Haldeman, he purchasing the other half. The plaintiff afterward indemnified J. Haldeman against his contract with defendant which he repudiated, and refused to receive any more ore or deliver any more iron, but furnished all the ore from the furnace from their common property. The defendant claims that plaintiff shall account for all the profits which defendant would have made from this contract. In 1854, the defendant having filed a bill against the plaintiff and P. Haldeman for specific performance of J. Haldeman's contract, the plaintiff in his answer alleging that the partnership with the defendant existed, the defendant in February, 1855, gave him notice of dissolution, but the defendant avers that it was dissolved in October, 1853; he denied that any debts were unpaid, or that any judgments had been recovered which were unpaid; he denied the right of plaintiff to claim an account for the Cornwall ore pending Coleman's proceedings; defendant had always furnished to plaintiff, when requested, full and correct statements of ore taken by him, and had endeavored to effect a settlement, and for this purpose referees were mutually chosen, but before they could act the plaintiff revoked the submission. The defendant proposed that each should pay one half the judgments obtained against them for the valuation money; but the plaintiff refused unless defendant would release damages on the J. Haldeman contract. To prevent a sale by the sheriff, defendant negotiated a transfer of the judgments for the valuation to Brooke & Coates, they paying in cash and acceptances; the defendant, on behalf of himself and plaintiff, to pay, besides costs, the expenses amounting to $1,200, Brooke & Coates to stay execution until the maturity of the acceptances, defendant to furnish them iron on commission to meet the acceptances; the defendant contracted for the sale of ore payable in iron which he delivered to Brooke & Coates,

the net proceeds to be applied to their acceptances; defendant expected in this way to discharge the balance due on the judgments; he denied that he had interposed any obstacle to the sale of Manada, or forbade any miner of plaintiff's to mine on the property, or that there was anything done by him to plaintiff; but averred his belief that there was a balance due from plaintiff to him.

A general replication was filed, and George M. Kline, Esq., was by agreement appointed master with authority of examiner, etc.

Amongst other things the master charged the Chestnut Hill ore at 85 cents per ton and the Cornwall ore at 75 cents per ton, as being the value of ore-leave at the respective ore-banks. In conclusion he found that the plaintiff was indebted to the firm of E. & C. B. Grubb in the sum of $31,727.09, and the defendant in the sum of $86,928.32, and the defendant was therefore indebted to the plaintiff in the sum of $27,600.61.

On exceptions the Court of Common Pleas reformed the report by reducing the amount due from the defendant to the plaintiff to $23,014.93.

Both parties appealed to the Supreme Court.

When the appeals came up for hearing in the Supreme Court, the whole case was referred to Samuel Robb, Esq., as master of that court.

The master reported the title to the real estate and the formation of the partnership, etc., as set out in the pleadings; he further reported: The valuation money of their real estate was to be paid by its use and the ore dug from it, the real estate and ore-rights were not conveyed to the firm, but for convenience and to avoid multiplication of accounts, the property was entered in the firm books, and carried through the firm accounts. The parties having bought the fee of the Chestnut Hill ore-banks, they took the title as tenants in common, and for the same reasons it was carried into the firm accounts; they erected the other furnaces mentioned in the pleadings and paid the expenses out of firm funds. Both attended personally to the business when the plaintiff moved to New Jersey. Several of the furnaces were rented at different periods from 1841 to 1849. Up to 1843 the payment of interest to the widow and co-heirs, and on account of

their shares of the valuation, was from the money of the firm. The business of the firm ended in 1849, with a single exception in 1851 which continued till in 1853.

On the 13th of March, 1851, the parties referred their matters to three referees who were to fix the amounts due them respectively for services to the firm since June, 1836; the referees settled their ore accounts to 1849, their accounts for services till 1851, and reported a balance of $5,265.73 due to the defendant, February 7, 1853. After 1853 the plaintiff claimed that the firm was undissolved; the defendant in consequence, on the 6th of February, 1855, gave plaintiff a formal notice of dissolution, and gave also public notice by advertisement. The accounts submitted to the master, by agreement, included all items from the beginning of 1849 to December 31, 1861.

"Each of the said parties used or sold ores dug or mined from the said property, employing the tools, implements and machinery, belonging, so far as it appears, to them jointly and each of them supplying money from time to time as it was wanted, for their several or joint benefit.

"There is no dispute as to the quantities taken by each of the said parties but it is claimed by the plaintiff that they should account as partners, either at the prices for which the ores were sold, or else for profits actually received, and, on the other hand, by the defendant, that they should account as tenants in common, and for ore-leave simply."

In 1857 and 1859 judgments for about $31,500 were recovered against the parties for unpaid balances of the valuation money due two of the sisters, Mrs. Parker and Mrs. Ogilvie; under these judgments the Chestnut Hill ore-bank was levied on and was advertised to be sold on the 13th of August, 1859. To prevent sacrifice the defendant proposed to the plaintiff, that each should pay one half of the judgments; this the plaintiff refused, except on terms deemed inadmissible by the defendant. The defendant then, without the knowledge of the plaintiff, effected an arrangement with the judgment creditors and the firm of Brooke & Coates, by which that firm agreed to assume the payment of the judgments, and accordingly paid $13,000 on the 10th of August, 1859, and for the remainder gave acceptances running from six to twelve months.

In consideration of this assumption, the defendant agreed to furnish to Brooke & Coates on commission, iron sufficient to meet the acceptances, and to fulfill this agreement he sold iron ore to certain iron masters from whom he received in payment notes which produced $34,638.40, and pig-iron which was sold by Brooke & Coates, and the net proceeds amounting to $24,175.25 more applied to the acceptances. The judgments were marked to the use of Brooke & Coates in 1860 and 1861. A controversy arose in closing the transaction with Brooke & Coates, which was finally settled by a decision of the Supreme Court, reducing the claim made by them by about $3,500. This matter was attended to exclusively by the defendant, who paid all costs and counsel fees. He claimed that he should account for the amount realized from 37,357 tons of ore, viz.: $58,813.65 ; should be credited with cost of raising it at $1.15 per ton, $43,019.07; costs and counsel fees, $843.94, amount of the judgment including the costs and counsel fees of the judgment creditors, $35,328.66, and commissions for his services, 10 cents per ton, $3,733.66. The plaintiff claimed that as the arrangements had been made without his knowledge, and as to counsel fees to judgment creditors, against his consent—at a time when defendant owed him almost, if not altogether, the amount of the judgments, the defendant should account for this as for other ore taken by him, and should not be allowed for costs, counsel fees or commissions.

The parties were owners, in 1842, of ore-rights, known as the "Bennett's Rights." Some dispute having arisen with other parties in regard to them, the legal title was conveyed to the plaintiff, and he removed to New Jersey in 1841, so that he might sue in the United States court. On the 18th of March, 1842, the plaintiff executed a declaration of trust, "that if any net profits, benefits and advantages should be realized therefrom after defraying the charges of litigation and all other expenses of realizing the same, then the said profits, benefits and advantages shall accrue to the use, and form a part, of the moneys of the said Clement B. Grubb and myself, copartners under the firm of E. & C. B. Grubb." A suit was brought in the Circuit Court of the United States, which was compromised in 1854. The plaintiff charged himself with $8,000,

the proceeds of the compromise, and claimed a credit for $3,000 his expenses, "by becoming a citizen of New Jersey for the purpose of bringing suit in the United States court to try these rights."

On the 12th of September, 1851, the defendant (the plaintiff declining to join with him) made a contract to supply John Haldeman with all the ore from the Chestnut Hill and Cornwall mines he might need at Henry Clay furnace, for five years from December 1, 1851, at the rate of $6.50 for every ton of pig metal made out of the ore, to be paid for in pig metal at $16 per ton at the furnace, or $18 at Philadelphia.

The defendant, in order to fix the price of the ore as between him and the firm, endeavored to make an arrangement with them for delivering the ore during his contract with J. Haldeman. The firm declined to do this, but, through R. N. Arms, their agent, on the 24th of September, 1851, contracted to deliver ore to him until April 1, 1853, from Chestnut Hill at $1.50 per ton, and to sell him ore-leave at Cornwall at $1 per ton, to be paid for at times specified in the contract. On this contract the defendant advanced $3,378.72, from September 30, 1851, to March 23, 1853, to raise ore.

The defendant continued to take ore to supply J. Haldeman until June 1, 1853. In the meantime, the price of iron had advanced to $35; the plaintiff then asked to share in the Haldeman contract, but the defendant refused. In May, 1853, J. Haldeman wishing to sell the Henry Clay furnace, the plaintiff proposed to the defendant that they should buy it; the defendant declined, and afterward, on the 7th of June, the plaintiff bought an undivided half of the furnace; P. Haldeman about the same time bought the other half. The plaintiff and P. Haldeman worked the furnace together, and ore was obtained from the two banks until Oct., 1853. Metal had been delivered to defendant July 1st and August 1st, 1853, he supposing that the ore had been obtained and the metal delivered under his contract with J. Haldeman and his arrangement under the Arms contract. Here the parties differed; P. Haldeman was willing, as to his half of the furnace, to proceed as under the J. Haldeman contract, "but the plaintiff insisted on his equal right to the ore, and refused to pay for his half in metal, and the defendant refused to receive

metal for Peter Haldeman for half only, and insist d upon receiving it for all the ore used at the said furnace."

The defendant, on the 6th of September, 1853, commenced an action of covenant against J. Haldeman on his contract.

On the 3d of October, 1853, an agreement was made between the plaintiff and J. Haldeman, which after reciting the circumstances relating to the contract between Haldeman and the defendant, the sale of Henry Clay furnace, etc., proceeded:

"And whereas, notwithstanding the premises, the said Clement B. Grubb has brought suit against said John Haldeman, on the said agreement made with him; and whereas, it would be unjust that the ore used for said furnace should be twice paid for, or that the said John Haldeman should be made to pay for ore he does not require, when such ore for the said furnace is to be accounted for to the said Clement B. Grubb as aforesaid.

"Therefore, in consideration of the premises, and of one dollar in hand paid by the said John Haldeman, I, Edward B. Grubb, do hereby covenant and agree to and with the said John Haldeman, his heirs, executors and administrators, that in case in the said suit brought by the said Clement B. Grubb against the said John Haldeman, or in any other suit to be brought by the said Clement B. Grubb against the said John Haldeman, on the said article of agreement, the said Clement B. Grubb shall recover any sum or sums of money that I will pay the same to the said John Haldeman."

On the same day, plaintiff agreed with P. Haldeman to supply his half of the furnace with ore from June 1, 1853, to December 1, 1856, on precisely the same terms as those between the defendant and J. Haldeman. At the foot of this contract was the following memorandum: "I acknowledge that Mr. Peter Haldeman has delivered to Clement B. Grubb on or about the 1st of July, 1853, 47 tons of iron, and about the 1st of August, 1853, 12 tons of iron on account of ore of E. & C. B. Grubb; and I do agree that the same is on account of this agreement."

In the suit of defendant against J. Haldeman, a *non pros.* was entered November 28, 1860.

On the 29th of May, 1854, the defendant filed a bill in the

Supreme Court against the plaintiff and P. Haldeman, praying that it might be declared that the J. Haldeman contract was binding on the plaintiff and P. Haldeman; that E. B. Grubb was not entitled to supply the furnace with ore; that the parties be compelled to perform the J. Haldeman contract, and be enjoined from using the ore, etc. Answers were filed, but nothing further was done in the case.

J. Haldeman was insolvent when the present proceedings were commenced. The defendant claimed that the plaintiff took the place and responsibilities of J. Haldeman in his contract.

The master stated the points of controversy to be:

1. As to the character in which the said parties should account, whether as partners or tenants in common.

2. As to the prices with which they should be charged for the ore taken or used by them respectively, whether on the basis of the value of ore-leave, or of the price at which sold.

3. As to whether or not interest should be charged, and, if so, from what time.

4. As to the liquidation of the Parker and Ogilvie judgments.

5. As to the plaintiff's claim for credit under deed of trust, March 18, 1842, for expenses of removal to New Jersey.

6. As to defendant's claim for credit under the Henry Clay contract.

7. As to debits and credits for raising Chestnut Hill ore.

As to the 1st point the master found:

"That this real estate was not brought into the partnership but was owned and held by the parties as tenants in common, and that therefore they must account as tenants in common."

On the 2d point the master found:

"As to the Cornwall ore, that the parties should account at the rate of 75 cents per ton, and as to the Chestnut Hill ore at 85 cents per ton, for all the ore taken by them respectively excepting the ore taken by the defendant under the Arms contract, for which he should account at the price therein stipulated."

On the 3d point the master found that interest should be

charged against the plaintiff on the balance struck by referees, February 17, 1853, from that date, and on ore furnished under the Arms contract from the times of payment specified in it; as to the remainder, from the time of closing the account.

On the 4th point:

"Considering that the arrangement made by the defendant was not made for his individual benefit, but to save the common property from sacrifice, the master is of opinion that it would be inequitable to charge him for the ore as for other ore taken by him, or to refuse him credit for the money paid or disbursed by him. This will exclude the defendant's claim for commission of 10 cents a ton, or $3,733.70, for the sale of this ore. This claim can not be allowed. It is too well settled to be now disputed that partners, tenants in common, or parties jointly interested in an enterprise, are not entitled to compensation for services rendered in the common business, in the absence of an agreement to allow it, and no such agreement has been shown."

On the 5th point he found that the plaintiff's expenses for his removal to New Jersey should not be allowed.

On the 6th point he found:

"That whatever claim the defendant may have, it can not be admitted as an item of account in the present proceedings, because (1) it is not within the scope of the account prayed by the bill; (2) it is a claim exclusively for unliquidated damages; and (3) the proper parties are not in court."

On the 7th point he reported:

"The evidence does not show that either of the parties paid the expenses of raising ores used by the other; on the contrary, it appears by the testimony of John McClure, who was in the employ of E. & C. B. Grubb and did the mining, that money was sent to him by both of them, and as they are charged for the ores taken and used by them respectively on the basis of ore-leave only, it is evident they are not to be debited with or credited for money paid for raising. The only exception to this is the Chestnut Hill ore taken by the defendant under the Arms contract, for which he is charged at the pit's mouth, and he is therefore entitled and is allowed credit for money advanced for raising the same.

"It is admitted that the defendant paid the expenses of hauling the ore used at Henry Clay furnace by the plaintiff between June 1st and October 1st, 1853, and the latter therefore is charged and the former is credited with the costs of hauling the same." * *

The master attached to his report statements of accounts between the parties respectively and the firm of E. & C. B. Grubb.

In the account of E. B. Grubb he is charged from the cash-book of the firm with a balance of $1,707.83. In making up that balance it appeared from the book that $2,500 had been credited to him for that amount paid by him to John McClure for raising ore.

The final statement of the accounts between C. B. Grubb and E. B. Grubb, as of April 11, 1870, as reported by the master, is as follows:—

"1861. December 31st.	
"C. B. Grubb's indebtedness to E. & C. B. Grubb	$64,755.72
"Deduct E. B. Grubb's do. do. do.	14,045.82
"C. B. Grubb's excess of indebtedness	$50,709.90
"Deduct his one half	25,354.95
"Balance due E. B. Grubb . .	$25,354.95
"To interest from Dec. 31, 1861, to April 11, 1870, 8 years, 3 months and 11 days	12,597.18
"Balance due E. B. Grubb April 11, 1870	$37,952.13"

Both parties filed exceptions to the master's report.

I. E. HIESTER and T. E. FRANKLIN, for C. B. Grubb

E. S. MILLER, C. B. PENROSE, J. L. REYNOLDS, and F. WATTS, for E. B. Grubb's administrator.

AGNEW, J.

This case has been so fully and ably examined and reported upon by Mr. Robb, the master appointed by this court, and his positions so well stated, a few comments only will be nec-

essary in noticing the points of controversy, rather than the exceptions in detail.

His conclusion that the real estate was held in common by Edward B. Grubb and Clement B. Grubb, and not in partnership, is correct. This is not inconsistent with its use for partnership purposes, and its appearance in the partnership books to the extent made necessary for the use of the partnership in the iron business. The partnership was related to it very much as in a case where partners lease land to carry on their business. The parties being equal as tenants in common as well as equal partners, the use of the land would, in the settlement of their partnership account, be the same in its results to them, as if as partners, they had leased the land of themselves as tenants in common. Hence the payments by the partnership for the owelty in the partition has no weight in the argument, for the result would be the same as if each partner had drawn from the firm an equal sum and applied it to his share of the owelty as a tenant in common. It is evident the payments in owelty did not change the character of the title vesting in them as tenants in common, and especially the title of so much as each held primarily as an heir, for which no owelty was paid. For the same reasons the Arms contract has no particular bearing on the question. The partnership had been operating in mining ore, and was still in debt, — as the agreement shows, to Parker, who was to receive the proceeds of the contract, — and was in possession of the tools and other facilities for mining, so that the Arms contract was really nothing more than a prolongation of the partnership for the mere purpose of mining as a means of paying the firm debt. As to the price of ore-leave, a majority of the court think that both masters having fixed upon the same prices for Chestnut Hill and Cornwall ore, it is not sufficiently evident they have made a plain mistake, and therefore, according to our rule, the report must be confirmed. To myself it has appeared differently. I can not see the weight of evidence which led Mr. Kline to fix the prices so far below those the parties were actually selling at; and it seems to me Mr. Robb followed Mr. Kline for the reason, that in differing from him he foresaw much perplexity in settling upon a satisfactory price. But the price of ore-leave, as

shown by the Arms contract, and the defendant's own account as rendered in 1859, by his admissions to witnesses, his contracts with third parties, and prices at neighboring mines, are not satisfactorily reasoned away by the master. Nor can I see how the contracts for ore-leave in iron can be rejected as corroborative evidence, especially in view of the rise of prices from $16 or $18 per ton for iron up to $34 and $35.

We concur with the master as to the interest, with a single exception to be noticed. It is argued that this being a case of tenancy in common and not of partnership, the rule for interest should be as between tenants in common. But in a court of equity each case rests on its own circumstances, and can not be made to fit a single unbending rule. Both parties were using the ore at pleasure, and without requiring each other to account. Annual balances were therefore uncertain. There was no known excess to be paid for as the business progressed. It was not a case of a willful detention of the profits of the land, but a mutual and voluntary delay in settlement. We must look at their mutual course of dealing. Until called upon to account neither could complain of the other, and neither could claim a balance till the accounts of both were settled. There were strong reasons for this mutual indulgence. Much of the ore was taken to pay partnership debts while the partnership was also taking its means to pay off incumbrances on their common estate. The whole case is therefore to be likened in its results to the settlement of a partnership account, in which interest has no place until a balance is struck. But there is an error in the interest charged on the Arms contract. In that contract Clement B. Grubb became a debtor to the firm, and was to pay the prices fixed in the contract at stipulated times. The master settled this account as for an individual debt, and therefore charges interest on the ore from the time it should have been paid for. But the account also shows that Clement B. Grubb advanced on the Arms contract, cash $3,378.72, to mine ore under it. This sum should be credited in the calculation, as there is no principle which can make Clement B. Grubb liable for interest on the money advanced to carry out the contract. We see nothing to correct in regard to the liquidation of the Parker and Ogilvie judgments. The master has taken an equitable

view of the matter. We apply the same remarks to the claim of the plaintiff for the expenses of his removal to New Jersey.

In the debits and credits for working Chestnut Hill ore there is one matter to be corrected.

The master settled the account of each party for ore on the basis of ore-leave, by deducting from the market value of the ore at the pit's mouth the cost of working it, etc., and for this reason he rejects both debits and credits, it being found that neither party had paid the expenses of working ores used by the other. To this there is no objection, the price of ore-leave being an equitable mode of accounting to each other. But by inadvertence, no doubt, he in effect credits E. B. Grubb with $2,500, paid to John McClure for raising ore. This happened by charging E. B. Grubb with the balance due on cash book to the firm. But in that cash account E. B. Grubb has been credited with $2,500, paid J. McClure for raising ore, reducing the balance from him to $1,707.83, the sum debited by the master to E. B. Grubb in settling the account. Having rejected all debits and credits for raising ore by taking ore-leave as the basis of the charges, it is evident the balance of the cash book should be increased by adding to it the $2,500 credited in it for raising ore.

The last matter which needs a special notice is the Henry Clay furnace contract with John Haldeman. We shall add nothing to what the master has said as to the difficulty of administering the equity, if the defendant be supposed to have any, against the plaintiff, as representing John Haldeman. It seems to us, however, that there is quite as much difficulty in sustaining the alleged equity. The defendant, in order to fulfill his contract with John Haldeman endeavored to effect an arrangement with the plaintiff for so doing, but failed to obtain from him a contract to furnish the ore to the Henry Clay furnace beyond the 1st of April, 1863, the period when the Arms contract was to end. This was notice, therefore, to the defendant, that the plaintiff would not furnish ore from their common property beyond that date. The plaintiff permitted the Arms contract to be carried out to the 1st of April, 1853, and beyond until about the 1st of June. He then bought one half of the Henry Clay furnace from John Haldeman, in May,

1853, and received the deed for it on the 7th of June, 1853. This he had a right to do. The contract between the defendant and Haldeman was wholly personal and did not run with the land. The plaintiff's purchase, therefore, after the expiration of the Arms contract, cast no liability on him; and his share of the ore-land was not bound for the performance of the Haldeman contract.

Peter Haldeman, who was the purchaser of the other half of the Henry Clay furnace, recognized the contract of the defendant with John Haldeman, and offered to accept the ore on the terms of that contract for his half of the furnace, but the defendant refused to accept his offer, and insisted on its entire performance, the effect of which would be to compel the plaintiff to extend the Arms contract beyond the period fixed by both for its determination. Down to this point there could be no claim against the plaintiff, in law or equity, to fulfill the Haldeman contract. How did the indemnity change the state of the case? It was not given until the 3d of October, 1853, and so far as the time or anything found as a fact, it constituted no part of the terms of the plaintiff's purchase of the one half of the Henry Clay furnace. It has no connection, therefore, with the tenancy in common or the partnership transactions. John Haldeman had then no connection with the furnace. His liability to the defendant was purely personal. By the indemnity the plaintiff created no privity between himself and the defendant; he did not undertake to fulfill, but rather to defend against a contract already broken, and the consideration of his undertaking does not appear to be connected with the joint property of the parties. The defendant could have no right of action on the indemnity, and there would appear to be no ground on which it could be brought within the sphere of the settlement of the partnership accounts or their tenancy in common. We perceive no ground for correcting the report on this head, and on the whole case we leave the report of the master to answer any other matter not touched upon in this opinion.

The result of the corrections above mentioned will stand thus:

C. B. Grubb, Dr., to E. B. & C. B. Grubb.

For balance per Master's Report . . .	$64,755.72
Credit by interest on $3,378.72, paid on Arms contract, say eight years	1,621.78
	$63,133.94

E. B. Grubb, Dr., to E. B. & C. B. Grubb.

For balance per Master's Report . . .	$14,045.82
Add error in balance of cash book . . .	2,500.00
Balance	$16,545.82
C. B. Grubb's balance	$63,133.94
E. B. Grubb's balance	16,545.82
C. B. Grubb's excess	$46,588.12
Deduct his half	23,294.06
Balance due E. B. Grubb's administrator . .	$23,294.06
Interest from Dec. 31, 1861, to July 6, 1870, eight years, six months and six days . . .	11,903.26
Balance due to E. B. Grubb's administrator, July 6, 1870	$35,197.32

And now, July 6, 1870, the court confirm the report of the master with the above modifications, and decree that C. B. Grubb do pay to the administrator of Edward B. Grubb the sum of $35,197.32, with interest from the 6th day of July, 1870, and the costs of the suit.

The "Cornwall Ore Banks" and "Mine Hills" in Lebanon County, Pennsylvania, a deposit of iron and copper ores, mined, or rather quarried, by taking the entire mass from the surface, and owned by tenants in common working separately, have furnished a mass of cases reported chronologically as follows:

Grubb v. *Guilford*, 4 Watts, 223; *Post* EASEMENT.
Grubb v. *Bayard*, 2 Wall. Jr. 91; *Post* LICENSE.
Coleman v. *Coleman*, 19 Pa. St. 100; *Post* PARTITION.
Coleman v. *Grubb*, 23 Pa. St. 393; *cited*.
Blewett v. *Coleman*, 40 Pa. St. 45; *Post* ORE.
Coleman v. *Blewett*, 43 Pa. St. 178; *cited*.
Coleman's appeal, 62 Pa. St. 252; *Post* TENANT IN COMMON.
Grubb's appeal, 66 Pa. St. 117; *supra*.
Grubb v. *Grubb*, 74 Pa. St. 25; *Post* INCORPOREAL HEREDITAMENT.
Grubb's appeal, 79 Pa. St. 120; *cited*.
Alden's appeal, 93 Pa. St. 182; *Post* RESERVATION.

BLEN V. THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

(20 California, 602. Supreme Court, 1862.)

[1] **Powers of president.** The powers of a president of a corporation extend only to matters arising in the ordinary course of the company business, and he has no authority to make contracts for the purchase of property, unless required in the usual course of business.

[2] **Ratification of purchase made by president.** The president of a corporation, who was also one of its trustees, purchased certain ditches and water privileges on behalf of the company, and immediately thereafter at a meeting of the trustees reported in writing that he had made the purchase, and set forth some of the terms of the contract, whereupon the trustees voted to ratify the report and proceedings. *Held*, that notwithstanding the incompleteness of the written report relative to the terms of the contract, it would be presumed that the matter was fully inquired into and explained at the meeting, and a party claiming that there was a mistake or misapprehension must show the fact.

Fraud—Rescission. To avoid a contract on the ground of fraud, the offer to rescind should be made as soon as the fraud is discovered. The vendee can not remain quietly enjoying the property for a long period of time after the discovery of fraud, and afterward repudiate the contract.

Interested witnesses. The exception to the general rule which forbids interested members of a corporation from testifying on its behalf is confined to keepers and depositaries of corporate documents. Members acting for the corporation in ordinary matters of business when interested, are incompetent to testify.

Appeal from the Eleventh Judicial District.

Action to recover money alleged to be due to plaintiff from defendant on the sale of certain ditch property. The case was before the Supreme Court on a former appeal, in the report of which (15 Cal. 96) the nature of the action is shown and a copy of the instrument sued on set forth, and in the opinion on that appeal a construction was given to this instrument.

Upon the new trial awarded by the Appellate Court, the plaintiff, to prove the execution of the contract by defendants, showed that the purchase was negotiated and the contract signed on behalf of the corporation by James Neall; that Neall was at that time the president, one of the trustees, and man-

[1] *Crump* v. *U. S. Co.*, 3 M. R. 455.

[2] *Union Co.* v. *Bank.*, 1 M. R. 432; *Moss* v. *Rossie Co.*, 1 M. R. 290.

aging agent of the corporation; that the contract was signed at Auburn, Placer county, and shortly afterward Neall proceeded to San Francisco and participated in a meeting of the board of trustees. Plaintiff then introduced a copy of the minutes of said meeting, as shown by the books of the company; of a portion of which minutes the following is a copy:

"At a meeting of the trustees of the Bear River and Auburn Mining Company, held at the Merchants' Exchange in San Francisco in the evening of the twenty-ninth of February, A. D. 1856, there were present James Neall, President, Frederick Billings, J. B. Thomas, G. W. Crofts, R. E. Brewster, and Amos Noyes, Directors.

"Mr. Neall, the president, having visited the work, made a report upon the condition of the same; which, upon motion of Mr. Billings, was accepted and ordered to be placed upon record. Report. 'To the Trustees of the B. R. and A. W. and M. Co. Gentlemen, * * * * And I further report, that I have purchased for the company, a certain ditch property known as the Tracy Ravine and Mississippi Bar ditch, or Blynn's ditch, together with a claim of about $2,700, bearing interest at the rate of three per cent. per month till paid, on a certain ditch known as the 'Beal's Bar Ditch,' by means of which we are enabled to appear in the market with our water on Union Hill, Beal's Bar, Rose Springs, and Mississippi Bar; which water, from the points taken on Miner's Ravine, would otherwise be lost to us or used to our disadvantage. For the last mentioned ditch and claim I paid $2,500 in cash, and agree to pay the further sum of twelve thousand ($12,000) out of the first net receipts of the said Tracy's Ravine and Mississippi Bar Ditch.'

"In making these purchases I am aware of having exceeded my authority given me by the board of trustees; but as the cash payments have all been provided without using any funds of the company, with the exception of the one hundred dollars paid on account of the 'Georgia Ditch,' it will be a very easy matter for the company to have matters righted in case it does not ratify my action, as I feel perfectly satisfied to assume the purchase or purchases on individual account, should the company think proper to decline them. J. NEALL."

"On motion of R. E. Brewster, Esq., the report and pro-

ceedings were ratified and approved by unanimous vote of the trustees present."

Plaintiff further showed that the $2,500 cash payment mentioned in the contract, was made to plaintiff at the time of the execution of the contract, and that shortly after the meeting of the trustees a deed to defendant was executed by plaintiff for the Tracy Ravine and Mississippi Bar ditch; that immediately after the making of the contract, the defendant took possession of all the ditches and property mentioned in it, and has retained possession up to the present time; that there was no offer to rescind the contract, and no repudiation of it attempted, until about one month after the commencement of this action; that immediately upon taking possession the agents of defendant were instructed to furnish water to the ditches sold by plaintiff in accordance with the provisions of the contract, and that the agents did furnish some water, but irregularly and of bad quality.

To sustain the allegation of fraud in the making of the contract, by which it might be avoided, the defendants proved that at the time of signing the contract, and pending the negotiations, Blen made certain statements to Neall and others of defendant's agents as to the grade of the ditches which he was selling, as to the sales of water which had been made from them by himself, and the probable amount that could be sold from them if supplied with water; also as to the priority of these ditches to the natural waters of the streams by which they were supplied, and particularly that the Beal's Bar ditch had priority of right over a ditch known as the Union House ditch in the waters of Miners' Ravine. Evidence was then introduced by defendant tending to show that these statements were untrue. From plaintiff's evidence, it appears that the agents of defendant made full examination of the property before the purchase; that they became fully acquainted with its defects, with its capacity to carry water, and with the state of the markets, shortly after the purchase, and that they made no offer to rescind the contract after such discovery for the period of two years, nor until this action was commenced.

Defendants further showed that about one year after the purchase, the owners of the "Union House ditch," leading

from Miners' Ravine, commenced an action against the plaintiff and defendant in this action for damages on account of diversion of the waters of said ravine by the Beal's Bar ditch mentioned in the contract of purchase; in which action, after a trial by jury, a judgment was obtained establishing the prior right of the "Union House ditch" to the use of the waters of said ravine, and for damages in the sum of $3,000 and upwards for the diversion of said water; which judgment the defendant in this action had been compelled to pay.

On the trial, the defendant called James Neall as a witness, who on his *voire dire* stated that in 1856, at the time the contract sued on was made, he was the owner of two shares of stock in the corporation, which stood in his name upon the books of the company; that in 1855 he was the owner of one hundred and twenty-six shares of defendant's stock; that in that year he borrowed from J. R. Crandall about $4,000, and at the same time assigned one hundred and twenty-four shares of his stock to Crandall, taking from him an agreement that upon the payment of the $4,000 he, Crandall, would sell and transfer the stock to him, Neall; that about three months ago Crandall had commenced suit against witness to recover the $4,000, and foreclose a mortgage upon the stock so assigned, upon the ground that the transfer was made to secure the repayment of the loan; which suit was still pending and undetermined.

Witness further stated that he considered his transaction with Crandall as a sale of his stock with power to repurchase and not as a mortgage to secure a loan; that since this trial commenced he had assigned the two shares of stock standing in his name on the books of the company, and had received an indemnifying bond and some money; which bond and money were, in his opinion, ample indemnity against any individual liability for cost or damages to which he might be subject on account of his former ownership of the two shares of stock recently assigned by him.

The plaintiff objected to the witness as incompetent, and the court sustained the objection, to which defendant excepted.

The second instruction given at request of plaintiff is as follows: "That when persons are negotiating about a sale

of real estate, where the property is open to the inspection of both parties, any representation made by the vendor concerning a matter which is open to the inspection of the vendee and of which he has the same opportunity as the vendor to ascertain the truth, is not fraudulent."

To the giving of which instruction defendant excepted.

The jury rendered a verdict for plaintiff for $14,950, and judgment was rendered accordingly. Defendant moved for a new trial, which was denied; and from this order and the judgment the appeal is taken.

S. HEYDENFELDT, for appellants.

TUTTLE & HILLYER, for respondent.

COPE, J., delivered the opinion of the court—FIELD, C. J., and NORTON, J., concurring.

The plaintiff sues to recover a sum of money alleged to be due him on a sale to the defendant of certain ditch property. The defendant is a corporation, and the contract for the property was made on its behalf by one Neall, who was its president, and a member of the board of trustees. The answer puts in issue the authority of Neall to make the contract, and sets up certain matters of fraud and misrepresentation as destroying its validity. These constitute the principal points of inquiry in the case, and we shall consider them without reference to the particular exceptions taken at the trial.

On the question of authority, the plaintiff relies upon the general powers of Neall as president, and upon a ratification by the board of trustees, and various acts showing an acceptance of the contract. It is clear that Neall had no such authority merely as president, for his powers in that capacity only extended to matters arising in the ordinary course of the business of the corporation. Outside of these matters he had no power to bind the corporate body, and he was not authorized to make contracts for the purchase of property, unless required in the usual course of business. The property purchased was for the use of the corporation, but the object in view was to extend its operations, and the purchase was of no utility for any other purpose.

The evidence of a ratification by the board of trustees is drawn from the record of its proceedings, and it is contended that taking the contract and the record together, no ratification appears. It is claimed that the board acted upon information communicated by Neall in a written report upon the subject, some of the provisions of the contract being omitted in the report. The report does not profess to give the details of the contract in every respect, but states generally the fact of the purchase, and the price to be paid; and points out the advantages to result from the transaction. The record recites that the board, by an unanimous vote, ratified the "report and proceedings," Neall, being present, participating in the ratification. The position taken is, that the board based its action solely upon the report, and was not sufficiently informed of the terms of the contract to make the ratification binding. In other words, that the board acted in the matter without a knowledge of the facts, and that a ratification under such circumstances is not valid and can not be enforced. The rule invoked is undoubtedly correct, but we do not consider the case a proper one for its application, as in our opinion the point raised rests upon a mere assumption. As Neall was present, it is hardly to be supposed that the report was received and voted upon in silence, for the matter was of too much importance to be disposed of in that manner. The natural presumption is that it was fully considered, and the particulars inquired into and explained, and the idea that this was not done is certainly at variance with the usual mode of conducting business. If it were not for the report, no doubt could possibly be entertained upon the subject, for the ratification amounts in itself to presumptive evidence of everything required to sustain it. A ratification supposes a knowledge of the thing ratified, and in the case of a contract, the inference from the ratification is, that its provisions were known. When the ratification is proved, this inference necessarily follows, and if there was any mistake or misapprehension, that fact must be shown. There is no evidence of any mistake in this case, and we can not infer that the board knew nothing of the contract except through the medium of the report. The circumstances indicate a different state of facts, for it is unreasonable to suppose that the board, with Neall at its head, confirmed the con-

tract in ignorance of its terms. It can not be said that the contract was not included in the ratification, for the "proceedings" were ratified as well as the report, and the "proceedings" embraced the contract. It amounted to an express ratification of the contract; and the mere fact that the report does not state all its provisions, is no evidence that the board was ignorant upon the subject. In this view, it is unnecessary to inquire whether the knowledge of Neall was of itself sufficient to bind the corporation; but we are inclined to the opinion that it was not. A similar question has occasionally arisen in other States, but the decisions are by no means harmonious; nor is there much difference in the weight of authority on each side. The subject is mentioned by Judge STORY in his work on the Law of Agency, but he merely refers to it, and arrives at no satisfactory conclusion. He cites the cases, however, and says that upon principle, notice to one trustee, unknown to the other members of the board, ought not to bind the corporation.

The subsequent acts relied on, are the acceptance of a deed, and the taking possession of and using the property; all of which, however, are consistent with the idea of a ratification by mistake. If it were shown that the board really acted under a misapprehension of the contract, we should be disposed to regard the subsequent acts attributable to the same error. If it appeared that the contract had been ratified by mistake, the presumption would be that the mistake continued throughout; but this, as we have stated, does not appear.

The fraud complained of was fully investigated by the jury, and we are unable to discover any error for which the verdict should be set aside. The evidence was submitted under proper instructions from the court, and it would require a very clear showing in such a case to induce us to interfere. If any fraud was committed, the fact was known long prior to the commencement of this suit, and it is too late now to avoid the contract on that ground. The offer to rescind should have been made as soon as the fraud was discovered, and the defendant could not remain in possession, quietly enjoying the property, and afterward repudiate the contract. This is also an answer to the point taken as to a partial failure of the consideration, except so far as such failure is relied upon by

way of recoupment. In this respect, however, we think the defense entirely fails, as the defendant undoubtedly received all that was contracted for. There was no breach of warranty, and there is no evidence from which fraud is necessarily to be inferred, and the right to recoup has no foundation to rest upon. It is said that the purchase was of a ditch represented to have priority of right to the water, and that this representation was untrue and intended to mislead. The inference from the evidence is, that the plaintiff made it in good faith, believing it to be true, and it is at least doubtful whether even the effect was to deceive. The matter was open to the investigation of both parties, and there is some evidence showing that the purchase was made with knowledge that the priority was disputed. We regard the allegations of fraud, however, as really unworthy of consideration, for the evidence is wholly insufficient to justify the charge of intentional misrepresentation.

We have examined the additional points made, and do not regard any of them as well taken; nor are they of sufficient importance to entitle them to special notice. The only point about which we have entertained a doubt is the rejection of Neall as a witness for the defendant, but we have come to the conclusion that he was properly rejected. We were disposed to regard him as standing in the position of an ordinary agent, and to hold his testimony admissible *ex necessitate*, as in other cases of agency, but we are satisfied that his interest disqualified him. The exception to the general rule in such cases, so far as the members of a corporation are concerned, seems to be confined to keepers and depositaries of corporate documents. Members acting for the corporation in ordinary matters of business are not included, and when interested they are incompetent to testify. The cases of *McAuley* v. *The New York Mining Co.*, 6 Cal. 80, and *Mokelumne Hill Canal Co.* v. *Woodbury*, 14 Cal. 265, settle the question of the sufficiency of the interest to disqualify.

The judgment is affirmed.

ROBINSON ET AL. v. SMITH ET AL.

(3 Paige Ch. 222. Court of Chancery of New York, 1832.)

A demurrer for want of parties is good only when the defect appears on the face of the bill.

[1] **Joint action by stockholders.** Stockholders suffering a common injury are not required to bring separate suits.

Discovery of facts warranting forfeiture. The objection that a discovery may subject the corporation to a loss of its charter is not sufficient to support a general demurrer to the whole bill.

Personal responsibility of directors. The directors of a corporation who willfully abuse their trust, or misapply the funds, or suffer them to be lost by gross negligence and inattention to their duties are to be held personally responsible by the exercise of chancery jurisdiction in favor of the stockholders.

Corporation, when a necessary party. In a suit against its directors for fraud and mismanagement the corporation is a necessary party either as complainant or defendant. The corporation in itself is the proper party plaintiff, but if the corporation refuse, stockholders may sue, making the company one of the defendants.

Demurrer ore tenus allowed—and defined in note.

The bill in this cause was filed by certain stockholders of the New York Coal Company against the directors of that corporation, charging them with improper conduct in the management of their trust. The company was incorporated in April, 1824, with a capital of $200,000. By its charter the company was restricted from carrying on any banking business, and was limited solely to carrying on the business of exploring for, digging and vending coal: Laws of 1824, p. 217. The bill charged that the commissioners named in the act opened books for the subscription to the stock, and that the corporation went into operation in June, 1824, when T. L. Smith, M. Hoffman, J. Minturn, C. Lawton, W. F. Pell, F. Pell, W. Israel, S. Legget, and S. L. Governeur, were chosen directors of the company. That T. L. Smith was elected president, and R. Abbott was appointed secretary. That soon after the company was organized, the directors purchased thirty acres of land, supposed to contain a coal bed, for which they paid $13,000. That they procured from the land about 3,000 bushels of coal which they took to the city of New York

[1] *Parrott* v. *Byers*, 40 Cal. 614; *Post* STOCK; *Blain* v. *Agar*, 2 Sim. 289; *Post* FRAUD; *Taylor* v. *Salmon*, 2 My. & Cr. 134.

as a sample. That some time in the course of the same year they sold the land, and, as the bill alleged, they had never since employed the funds of the company for the purpose of carrying on the business of exploring for, digging or vending coal. The bill further stated that since that time the directors of the company had used and employed their funds almost exclusively in the purchase and sale of the stocks of various corporations and institutions. That they came to a determination to purchase a majority of the stock of the City Bank, and did by their agent purchase 16,000 shares of the stock of that bank at a premium of from two to nine and a half per cent. That they pledged the same to individuals to raise money thereon, at about ninety per cent. upon the par value of the stock, and paid the difference out of the funds of the coal company; and that the individuals to whom the bank stock was pledged, gave to the agent of the coal company their proxies to vote for directors of the bank. That the company ordered its agent to vote for T. L. Smith, C. Lawton, W. F. Pell, and others as directors of the bank; that he did so vote, and that they were accordingly elected such directors on the first Monday of June, 1825.

That the stock of the City Bank was afterward sold at a loss of from ten to twenty per cent., by which the coal company lost $50,000. The bill also charged that this operation of the directors of the coal company was to subserve their private purposes, and was in violation of their known duty as directors of the company. The bill further charged that the directors of the coal company also purchased 1,500 shares of the New York Gas Light Company, at a premium of from eighty to one hundred per cent.; 1,000 shares of the New York and Schuylkill Coal Company, at an advance or premium of from ten to thirty per cent.; 1,500 shares of the Bank of America, at a premium of from three to eight per cent; 1,000 shares of the Jersey City Bank, at a premium of from twelve to twenty-five per cent.; 1,500 shares of the Mercantile Insurance Company, at a premium of from eight to twelve per cent.; 1,000 shares of the Franklin Fire Insurance Company, at a premium of from eight to twenty per cent.; and 1,500 shares of the Brooklyn Gas Light Company, at a premium of seven per cent. That a portion of the said stocks had been since sold, and on which the company sustained a loss of about

$62,000, exclusive of the loss on the City Bank stock. That a considerable portion of the stocks thus purchased had not been resold, and were greatly diminished in value. That the whole amount of these and other stocks purchased by the directors, or in which the company was interested, amounted to nearly two millions of dollars. By which dealings the directors caused a loss to the coal company of not less than $150,000, and thereby rendered its stock of very little value. The bill further charged that the amount of debts owing by the coal company during a part of the time when these stock speculations were going on, exceeded fifteen times the amount of the capital paid in. The president and secretary were also made defendants; the bill charging that the books and papers of the company were in their possession. The complainants prayed a discovery and for general relief.

The defendant, F. Pell, put in a general demurrer to the bill for want of equity. The other defendants put in a general and special demurrer; and for causes of demurrer, they stated that it appeared by the bill that the complainants were owners of their stock in severalty, and had no joint interest therein; that the capital stock of the company was 4,000 shares, and that the complainants were owners of only 160 shares. They therefore insisted that the owners of the other shares should have been made parties.

C. G. TROUP & G. F. TALLMAN, for the defendants.

C. GRIFFIN, for the complainants.

The Chancellor (WALWORTH.)

Before I proceed to examine the merits of this case, it may be proper to refer to the causes assigned as special grounds of demurrer. And first, it is said there are other stockholders who ought to be made parties. Where it is not apparent from the bill itself that necessary parties are omitted, it can be taken advantage of only by plea or answer; showing who are the necessary parties, and making the objection of a want of parties in a plain and explicit manner: 2 Paige's Rep. 280; 1 Monro's Kent. Rep. 107; 1 A. K. Marsh, Rep. 112; 1 Hogan's R. 70. The defendants can demur only when it is apparent from the bill itself that there are other persons who

ought to have been made parties. And the demurrer should show who are the proper parties. It is true the capital stock of the corporation is, by the charter, to consist of 4,000 shares; and the complainants own but 160. But it also appears from the act of incorporation, that the defendants who were directors, must also have been stockholders. And, from aught that appears to the contrary, they may now be the owners of all the residue of the stock subscribed.

The objection for multifariousness can not be sustained. All of the complainants are *cestui que trusts*, having similar interests, in every respect and arising out of the same trust. They are seeking precisely the same redress against their trustees, and for the same acts, by which they allege they have received a similar and common injury. There is, therefore, no good reason for requiring them to file separate and distinct bills. It is a favorite object of this court to prevent a multiplicity of suits. And where several persons have a common interest, arising out of the same transaction, although their interest is not joint, even the defendant may sometimes insist that they shall all be made parties, that he may be only subjected to the trouble and expense of one litigation. Upon the principle of the decision of this court in *Brinkerhoff* v. *Brown*, 6 John. Ch. Rep. 139, the complainants were authorized if not required, to join in this suit.

The objection that a discovery may subject the company to a forfeiture of its charter, is not sufficient to support this general demurrer to the whole bill, both as to the discovery and relief, even if it would have authorized a demurrer to the discovery of particular facts. Under the provisions of the revised statutes, the defendants may be compelled to make a discovery in certain cases, although it may subject the corporation to a forfeiture of its corporate rights: 2 R. S. 465, § 52.

If the allegations in this bill are true, there is no doubt that the directors of this company were guilty of a most palpable violation of their duty by engaging in this gambling speculation in stocks, which was wholly unauthorized by their charter, and which, the bill alleges, was carried on to subserve their own individual interests and purposes. I have no hesitation in declaring it as the law of this State, that the directors of a moneyed or other joint stock corporation, who

willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good their loss. And they are equally liable, if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust. Independent of the provisions of the revised statutes, which were passed after the filing of this bill, this court had jurisdiction, so far as the individual rights of the corporators were concerned, to call the directors to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust, or the willful neglect of a known duty. To this extent Chancellor Kent, in the case of *The Attorney General* v. *The Utica Ins. Co.*, 2 Johns. Ch. Rep. 389, admitted the court had jurisdiction, although he doubted the general powers of this court over the corporation itself to prevent an abuse of its corporate privileges.

Until very recently, but few incorporated companies, in which individuals had any direct pecuniary interest, existed in England, except corporations for charitable purposes. And this court would very reluctantly interfere with the concerns of mere municipal corporations, where a sufficient remedy is afforded by mandamus or *quo warranto*, or by an indictment against the officers of the corporation, for any abuse of their powers by which the public has sustained an injury. But since the introduction of joint stock corporations, which are mere partnerships, except in form, the principles which were formerly applied to charitable corporations in England, may be very appropriately extended to such companies here. The directors are the trustees or managing partners, and the stockholders are the *cestui que trusts*, and have a joint interest in all the property and effects of the corporation. See Wood's Inst. B. 1, ch. 8, p. 110; 11 Coke's Rep. 98 b. And no injury the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy.

In the language of Lord HARDWICKE, in a similar case: "I will never determine that a court of equity can not lay hold of every such breach of trust. I will never determine that frauds of this kind are out of the reach of courts of law or equity; for an intolerable grievance would follow from such a determination": 2 Atk. Rep. 406.

The demurrers on the record are therefore not well taken, and should be overruled. The defendants have, however, assigned as causes of demurrer, *ore tenus*, that it is not alleged in the bill that the corporation, by its officers, refused to sue, or that the defendants are the present directors having the control of the corporation, and that therefore the suit should have been in the name of the corporation. That even if a sufficient excuse is shown by the bill, for bringing the suit in the name of the stockholders, the corporation should be before the court as a party defendant. I think at least one of these objections is well taken, and that the corporation should be before the court either as complainant or as a defendant.

Generally, where there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit to compel them to account for such waste or misapplication, should be in the name of the corporation. But as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant. And if the stockholders were so numerous as to render it impossible, or very inconvenient to bring them all before the court, a part might file a bill in behalf of themselves and all others standing in the same situation: *Hichens* v. *Congreve*, 4 Russ. R. 562. Although the Revised Statutes have provided for cases of this kind in future, this bill can not be sustained unless it is made to conform to the law as it existed at the time the suit was commenced.

The demurrer *ore tenus* is therefore allowed, upon payment by the defendants of the costs of the demurrer on the record: *Attorney General* v. *Brown*, 1 Swanst. Rep. 288; *Durdant* v. *Redman*, 1 Vern. 78.[1] But the complainants are to be at liberty to amend as they may be advised.

[1] A demurrer *ore tenus* appears to be in the nature of a new demurrer to same part of the bill which was before demurred to, and it was allowed in this form, upon the argument of the demurrer on record, to prevent injustice; as the defendant can not again be allowed to demur to the same matter in any other way. See 11 Ves. Rep. 70.

BURMESTER V. NORRIS.

(6 Ex. 796. Court of Exchequer, 1851.)

Directors can not borrow money. By the deed of settlement of a mining company the capital was made £50,000, and it was provided "that the affairs and business of the company should be under the sole and entire control of the directors." The deed empowered the directors, if they saw fit, to create new shares by vote at a special general meeting, the capital having been expended. *Held*, that the directors had no power to borrow money on the credit of the company for the necessary purpose of working the mines.

Assumpsit by the plaintiff, as public officer of "The London and Westminster Bank" against the defendant, appointed under the 11 & 12 Vict. c. 45, official manager of "The German Mining Company," for money lent, etc. Plea, *non assumpsit.*

At the trial before PLATT, B., at the London sittings after last Michaelmas Term, it appeared that, in the year 1836, a company, called "The German Mining Company," was established by deed of settlement, for the purpose of purchasing and working certain mines in Prussia and Bavaria. The deed of settlement provided that the capital of the company should be 50,000*l*, in one hundred shares of 500*l* each, to be paid by certain installments, and with respect to the general management of the company, it contained the following clause:—"Clause 3, That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five, nor more than nine; that three of them shall, at all meetings of directors, and for all purposes, be competent to act, and that the directors shall appoint and remove all officers and servants of the company, and award to them salaries, wages and other compensation, as they shall think fit; and any director or directors shall be removable by a majority of votes, at a general meeting of the shareholders especially convened for the purpose; and all boards of directors shall be held in London, and not elsewhere, unless under the authority of a board in London." No express power to borrow money was given to the directors, but the deed contained the following provision: "Clause 33, That in case it shall ap-

pear to the directors to be desirable to sell and dispose of any of the mines and property of the company, or to subdivide the shares therein, or to create new shares, or to subdivide present shares, or to make any alteration in the constitution of the company, or to propose any new rules, powers or conditions for carrying on the same, or to rescind. alter or make any additions to the clauses, powers and provisions herein contained, or any other matter or thing which may not be or appear to be within the scope, intent and meaning of these presents, it shall be lawful for the directors to call a special general meeting or meetings of the shareholders, for the purpose of taking such matter or subject into consideration, and adopting or rejecting the same, and that such matter shall be disposed of, adopted or rejected at such special meeting, or by the result of a ballot taken in pursuance thereof, as if the same had been a matter or subject thereby expressly made cognizable and determinable by a special meeting or ballot."

The capital proposed to be raised by the original shares was paid up and expended and more funds being required to carry on the undertaking, new shares were created by a resolution adopted at a special meeting of the shareholders pursuant to the terms of the deed. The receipts from these sources, and from the proceeds of the mines, were, however, still inadequate to meet the expenses; and the directors had, from time to time between 1842 and 1848, borrowed large sums of money from the London and Westminster Bank, for the *bona fide* purpose of working the mines. The moneys so borrowed were entered in the books of the company, and appeared in the annual reports presented at the general meetings held pursuant to the deed, and which reports were regularly sent to the shareholders. In 1848, an order was obtained for winding up the company, and the defendant was appointed official manager, and this action was brought, in pursuance of an order of Vice-Chancellor Knight Bruce, to recover the balance due to the London and Westminster Bank upon these loans.

The learned judge left it to the jury to say, whether the borrowing of the money was necessary for carrying on the affairs of the company; and whether the directors had acted on behalf of the company, and had borrowed the money on the credit of the company.

The jury having found these questions in the affirmative, a verdict was entered for the plaintiff for 8,400*l.*

In the following Hilary Term, a rule *nisi* was granted for misdirection; against which Sir F. THEISIGER and BOVILL showed cause in Trinity Term (May 28). The question is, whether the directors of the company had power under the deed of settlement to borrow money for the necessary affairs of the company. No doubt the money was borrowed with the knowledge of all the shareholders, so that if acquiescence on their part was necessary to render the transaction valid, there was ample evidence of it. It also appeared that the undertaking could not have been carried on without further funds. Under these circumstances, the language of the 3d clause is comprehensive enough to confer on the directors the power to borrow money; for the *affairs and business* of the company are to be under their sole and entire control. In the case of *The Bank of Australia* v. *Breillat*, 6 Moo. P. C. 152, the deed of settlement gave the directors of a joint stock banking company "full power and authority to superintend, order, conduct, regulate, and manage all and singular the affairs and business of the company, to the best of their discretion and judgment"; and it was held, that the directors might borrow money for the purpose of discharging the existing liabilities of the bank, till the assets should be realized. In that case, as here, the deed contained a power to create additional capital by issuing new shares; and it was urged that such was the only mode by which the directors could obtain the necessary funds; but the court considered that they might borrow money by virtue of their general powers. The present case is still stronger, for there the money was borrowed for the purpose of discharging liabilities then incurred; here it is borrowed for the purpose of being applied to the very object for which the company was constituted, viz., working the mines. The authorities relied on by the other side are distinguishable. In *Dickinson* v. *Valpy*, 10 B. & C. 128, the question was, whether the directors of a mining company had authority to bind their co-adventurers by drawing or accepting bills; and there was no evidence of such authority, or that it was necessary in order to carry on the concern. Here the deed confers on the directors unlimited power with respect to the

management of the affairs and business of the company; and it is found as a fact, that the money was required to carry on the undertaking. *Hawtayne* v. *Bourne*, 7 M. & W. 595, merely decided that the resident agent, appointed by the directors of a mining company to manage the mine, has no *implied* authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the laborers in the mine. But there are cases which show that, if it be necessary or usual in the working of mines that the members of the company should bind each other by dealings on credit for that purpose, they have authority by law to do so, in the absence of any proof of a more limited authority: *Tredwen* v. *Bourne*, 6 M. & W. 461; *Hawken* v. *Bourne*, 8 M. & W. 703, and if the shareholders, being cognizant of the mode in which the directors conduct the concern, sanction their course of proceedings, it is binding on them: *Steigenberger* v. *Carr*, 3 M. & Gr. 191; *Ridley* v. *Plymouth Baking Company*, 2 Exch. 711; *Ricketts* v. *Bennett*, 4 C. B. 686, proceeded on the ground that there was no evidence of any usage by mining adventurers to borrow money, nor any evidence of necessity.

The ATTORNEY-GENERAL, CROWDER, COWLING, CARPENTER, SMITH, and DREWRY, in support of the rule: The proper way of ascertaining whether the directors have the power in question is, by looking to the terms of the deed, which constitutes the true relation between the directors and shareholders. Now, the deed, after vesting in the directors the management of the affairs and business of the company, goes on to empower them to call a special meeting for the purpose of creating new shares in case they should think further capital necessary. The persons who subscribed a certain amount of capital for a given purpose, and who authorized further capital if necessary, to be raised in the mode prescribed by the deed, could never have intended that the directors, instead of procuring capital in the manner pointed out, should get it by borrowing money. *Hawtayne* v. *Bourne*, 7 M. & W. 595, is an express authority that the managers of a mining concern have no authority to pledge the credit of the shareholders by borrowing money for any purpose, however necessary, for the benefit or even preservation of the mine. Here it is

not a question of necessity, but whether, upon the terms of the deed, there is any expressed or implied authority to the directors to borrow money. The provision enabling them to raise money in a particular way negatives any such author ity. The powers intrusted to the directors must be executed strictly, according to the terms of the original contract; otherwise their acts are not binding on the shareholders. *Ex parte Morgan, in the matter of the Vale of Neath Brewery*, 1 Mac. & G. 225; *Bosanquet* v. *Shortridge*, 4 Exch. 699. In *Ricketts* v. *Bennett*, 4 C. B. 686, the shareholders were held not to be liable, although the money was borrowed to prevent the mine from being drowned.

In the case of *The Bank of Australia* v. *Breillat*, 6 Moo. P. C. 152, the deed of settlement conferred on the directors all the powers incident to an ordinary banking co-partnership, and, consequently, the power to borrow money. Here the powers of the directors are clearly defined. The 33d clause enables them to sell and dispose of the mines and property of the company; but that can only be done in the mode there pointed out. It is the same with respect to raising further capital. The directors could not of their own accord mortgage the mines; and, *a fortiori* they can not pledge the credit and private fortunes of the shareholders. There is good reason why the powers of the directors in a company of this description should be more limited than in an ordinary partnership; for in the latter, each partner is acquainted with the partnership transactions; whereas in the former, they are intrusted to the management of a few persons. The directors are trustees of the property of the company; and, as such, are incapable of departing from the terms of the instrument creating the trust: *Fisker* v. *Tayler*, 2 Hare, 218.

Cur. adv. vult.

ALDERSON, B., now said: This was a motion for a new trial, which was argued before us last term. The question was, whether the directors of a company, by whom certain German mines were to be worked, had power to borrow money for that purpose. It appeared from the circumstances of the case, and the jury found as a fact, that it was necessary for the purpose of working the mines that the money should be bor-

rowed; but, notwithstanding that finding, we are of opinion that the directors of the company had not any such power. The company was to levy a sum of 50,000*l*, with which to carry on the undertaking; and the deed of settlement, by which the directors were authorized to act, contains a power in these general terms: "That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five, nor more than nine; that three of them shall, at all meetings of directors, and for all purposes, be competent to act." No doubt those are very large words, but they must be taken in conjunction with the general words and purport of the deed, and those confine the undertaking to the working of the mines by levying a large sum of money as capital, to be applied to that purpose. It follows, therefore, that the directors had the exclusive and entire control only with respect to the management of the company by means of the moneys so to be levied and applied, and that they had no power whatever to borrow money. It would make a vast difference to the shareholders if the power contained in these words were to be construed as imposing on them an unlimited responsibility beyond the capital which they supposed they would have to subscribe, and with which the concern was to be entirely carried on. We think, therefore, that my brother PLATT was wrong in leaving the point to the jury; and that though, in their opinion, it might be necessary for the purpose of working the mine that the money should be borrowed, yet that could not be done without the consent of all the subscribers. With the consent of all the subscribers no doubt it might be done, but that would be on a totally different footing. We think, therefore, there must be a new trial.

Rule absolute.

CRUMP ET AL. V. UNITED STATES MINING CO.

(7 Grattan, 352. Court of Appeals of Virginia, 1851.)

Collateral attack on charter. In an action by a corporation the question of its having forfeited its charter is not open for inquiry unless the for-

feiture has been ascertained by the sentence of a court in a proper proceeding for that purpose.

Proof of corporate organization. The organization of a corporation may be proved by its records and parol proof without the production of its list of subscribers.

[1] **Ratification—Sale of old stock instead of issuing new.** The stockholders ordered the directors to create new stock and sell it; instead thereof the directors acquired original stock and sold it. *Held*, that such act might be ratified subsequently by the stockholders so as to render the sales valid and binding upon the purchasers.

[2] **Misrepresentations, without intent to defraud.** In written proposals for a sale of stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, the contract may be avoided, whether the vendors knew the representations to have been false or not; and whether made with or without a fraudulent intent.

Suppression of facts. In such a case the suppression from the proposals of any fact within the knowledge of the vendors materially affecting the value of the stock and inconsistent with the statements given in the proposals, vitiates the contract as fully as the false affirmation of facts.

Subsequent failure of the mine. If the representations were materially true, and no facts suppressed, the subsequent failure of the mine does not impair the right of the vendors to enforce the contract.

Corporation held to representations of agent. A corporation is bound by the misrepresentations of its agent authorized to sell, though of limited powers, and although they were neither authorized by nor known to the company.

[3] **Representations of president.** The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may have directed to be sold; and unless appointed agent to sell, his representations are not binding on the corporation.

This was an action of debt, brought in the Circuit Court of law for the county of Henrico and the City of Richmond, by the United States Mining Company, against Crump and Liggon. It was one of twenty-eight actions brought by the same plaintiffs against certain subscribers to the stock of the company, for arrears due upon their stock. All the cases turned upon the same questions, and were submitted to the same jury.

[1] *Robinson* v. *Smith*, 3 M. R 443.

[2] *Webster's Case*, L. R. 2 Eq. 741; *In re Russian Iron Works*, L. R. 1 Ch. App. 574; *Smith* v. *Reese River Co.*, L. R. 2 Eq. 264; *Post* PROSPECTUS.

[3] *Robinson* v. *Smith*, 3 M. R. 443.

On the trial of the causes the plaintiffs introduced in evidence an act of the General Assembly of Virginia for the incorporation of the United States Mining Company, and then offered in evidence a minute book purporting to be a minute book of the company, for the purpose of proving the existence of the corporation. To this evidence the defendants objected, upon the ground that it was not competent until it was shown by the subscription list of stockholders, that the persons who assembled on the 16th of August, 1834 (the day when, according to the minute book, the company was organized), were stockholders authorized to associate and act as such; and they called for the production of such list—whereupon the plaintiffs offered to prove by J. J. Chew, that shortly after the passage of the act of incorporation, the company had an office or place of business, where the business to carry on which they were incorporated, was carried on; and that the affairs of the company had been managed by directors who were chosen from time to time. That he was himself a subscriber, and had paid, after the organization of the company, a portion of his subscription as called for from time to time; and that he had sold out his stock to a person who had fully paid up to the company the instalments due upon it.

That he had transferred said stock in the office of the company on the books of the company. And that the various books purporting to be the books of the company, including the minute book aforesaid, were kept in the handwriting of Richard B. Maury, who was the recognized, notorious secretary of the company from the time it purported in said books to have been organized, and his appointment as secretary, until the death of said Maury. The plaintiffs by their counsel stated also, that they proposed to follow up the evidence of Chew in further proof of the organization of the company, by evidence that each and all of the present defendants recognized the company as an existing corporation, by entering into the contracts with the said corporation upon which the present actions were brought—whereupon the defendants moved to exclude the testimony of Chew, upon the ground that such testimony was not competent in the absence of the subscription book, which being written evidence of the fact

that the persons who claimed the right to act as a corporation, were subscribers to stock, could not be dispensed with, unless shown to be lost or destroyed, by any parol proof of the fact which such subscription list would establish. But the court overruled the motion, and admitted the testimony; and the defendants excepted.

In the further progress of the cause, the plaintiffs offered in evidence the prospectus of a sale of the stock of the company signed by William Jackson, the president, and the contract annexed thereto, on which this action is founded, and proved the signatures of the defendants to the contract by which they each subscribed for the number of shares annexed to his name. They also introduced a printed report of the president and directors giving a description of the property and of the condition and prospects of the company, which was referred to in the prospectus. They also introduced copies of the certificates of stock issued by the company to the defendants, and offered evidence to prove that the defendants had received a dividend of five per cent. upon the amount of forty dollars a share paid in by them for their stock, and they introduced certain proceedings of the defendants, by which they expressed their determination to pay no requisitions which should be made upon them on account of their stock. And the plaintiffs then rested their case.

Whereupon the defendants called a witness, John H. Eustace, whose name appears first upon the list of subscribers mentioned above, who stated that the signature of his name was not in his handwriting, and that he had no recollection of having given any person authority to make it for him; though he has no doubt he did, but that he had never paid anything for the stock standing against his name, nor had he been called upon to pay anything for it. The defendants then called a witness, James B. Cowles, who proved that his signature to the subscription list aforesaid was genuine. That the book which contained the prospectus and list was in the hands of James Williams, who came to the city of Richmond as the agent of the plaintiffs to sell their stock, and presented the said prospectus and subscription list, but did not show him, and he did not ask for, the printed report before referred to; and induced the witness to subscribe for stock, which he

did without reading the prospectus. And then the defendants offered to prove by the witness Cowles that Williams, at the time of procuring the subscriptions to the said stock from the witness and the defendants, and for the purpose of inducing him and them to subscribe for and purchase the stock, made representations to them in addition to those contained in the report and prospectus, as to the description, condition and value of the gold mine, upon the faith of which he and the defendants became subscribers for the stock, as shown by the list aforesaid; which representations were false and fraudulent, and for the purpose of getting such proof, asked the witness to state what representations were made to him and the defendants, as aforesaid, by Williams, touching the value and description of the mine and condition of the company. But the plaintiffs objected to the question and any answer thereto, upon the ground that it was not competent for the defendants to give evidence of any representations by said Williams, because they insisted he was a limited agent, whose authority was defined by the prospectus aforesaid and the printed report referred to in it. The court sustained the objection and excluded the evidence; and the defendants again excepted.

After the introduction of the evidence mentioned in the previous exceptions the defendants proposed to prove by the witness Cowles that when Williams made the representations referred to in the preceding bill of exceptions, William Jackson, the then president of the company, whose name was signed to the prospectus, was present and assented to them; and also proposed to prove that the same representations were made sometimes by Williams in the presence of Jackson and sometimes by Jackson himself, to other subscribers for stock, who are defendants in these causes. The witness did not identify Jackson very confidently, though he expressed the belief that the person who was with Williams was the same with William Jackson, the president of the company, who was then in court, and was pointed out to the witness. The counsel for the defendants then asked the witness to state what the representations were which were made as aforesaid by Williams and assented to by Jackson. But the plaintiffs by their counsel moved the court to exclude all evi-

dence of any such statements or representations made in the presence of or by William Jackson, the president of the company, which were not contained in the written prospectus, and the report therein referred to upon the ground that the said prospectus and report contained the only representations of the value of the mine and stock and the condition of the company, which could be given in evidence in the cause, based upon any representations of Jackson or Williams.

The court sustained the motion and excluded the evidence; and the defendants again excepted.

It appears that an act for the incorporation of the United States Mining Company was passed in January, 1834.

This act constituted John L. Marye and four other persons by name, and such other persons as should be thereafter associated with them, a corporation for the purpose of mining. These five named gentlemen owned a tract of land on which the mining was expected to be carried on. Their proposals for the disposition of stock were, that the land should be put in as a part of the capital stock of the company, at $150,000 in payment of which they were to receive $40 a share on each share subscribed for by others than themselves, until the proceeds with their own subscription, which was to be for five hundred shares in the first instance, should make the sum of $150,000. It was first intended that the capital stock should be $300,000; of which the original proprietors were to take five hundred shares, and the rest to be sold out to other persons; but it was afterward agreed to reduce it to $180,000. Of this sum the original proprietors subscribed for five hundred shares, equal to $50,000, and other persons subscribed for five hundred and nineteen shares, equal to $51,900. The proprietors then, to make up the capital stock, subscribed for the remaining seven hundred and eighty-one shares; and the company was organized, and proceeded to business.

At the annual meeting of the company held about the 17th of August, 1836, a committee made a report in which they "earnestly recommend that the mine should be further developed and worked on a scale commensurate with the immense treasures it contained"; and to obtain the means thus to enlarge the operations of the company, they recommend a sale of the capital stock to the amount of $70,000 and advise that it shall be sold at a premium of $10 a share.

In accordance with the recommendation of the committee the stockholders, on the 17th of August, adopted a resolution authorizing the board of directors to create six hundred and eighty-nine shares of additional stock, upon such terms as they might deem most expedient; and that they should cause books for the sale of the same to be opened when and where they might think proper. On the 14th of September the board of directors adopted a resolution in which it was recited that the original proprietors had proposed to surrender to the company a part of the stock received by them in payment for the mine, not exceeding seven hundred and eighty-one shares, provided the company would issue new scrip for a like number of shares to such subscribers as are content to pay therefor to the proprietors $40 per share, and to the company $60 per share. And it was declared that the proposition met the approval of the directors, and directions were given for carrying it into execution. Some time after the stock had been subscribed for by the defendants, these proceedings of the directors were approved and ratified by the stockholders.

In pursuance of the resolutions aforesaid, the prospectus referred to in the second bill of exceptions was prepared, in which it was stated that the company holding in reserve 781 shares of the original stock of the company, propose to sell the same on the following terms and conditions, viz: The terms were then stated, and it was added that the mines were in full and successful operation, having three veins of valuable ore, one of which was then working at the depth of eighty feet, etc. And for a full description of the mines, buildings, machinery, etc., reference was made to the last report of the president and directors of the company.

To this prospectus was attached a subscription paper, upon which the defendants in these cases made their subscriptions. These are the papers referred to in the foregoing exceptions, and which were in the hands of Williams, the agent of the company, when he was in Richmond, soliciting subscriptions to the stock.

In addition to the written evidence much parol testimony was offered by both parties, on the one part to prove that a fraud had been practiced upon them in the sale of the stock, and on the other to repel and disprove the imputation; but

only such a statement of the proofs is given as will show the nature of the claim and of the defense, and the relevancy of the instructions given or refused by the court. In 1837 the mine proved to be unprofitable and was abandoned.

After all the evidence had been introduced the defendants by their counsel, moved the court to instruct the jury as follows:

1. "If from the evidence the jury shall believe that the United States Mining Company, either by forfeiture of its charter or by failure to appoint the proper officers and non-user, has ceased to be a legal corporation, this suit can not be maintained, and a verdict must be rendered for the defendants."

2. "That the stockholders of the United States Mining Company in general meeting, only, and not the board of directors, had authority to create new stock, and if they shall believe that the stockholders in general meeting authorized a sale of new stock, and the defendants afterward, in Richmond, made their subscription for stock; and after that subscription, without the assent of a general meeting of the stockholders, and without the assent of the defendants, the board of directors purchased old stock from the original proprietors, and did not create new stock according to the authority and resolution of the stockholders, and have not created any, the plaintiffs are not entitled to recover."

But the court refused to give the first instruction, upon the ground that whether the supposed acts of forfeiture, the failure to appoint officers, or other acts of non-user, did exist or not, they could not be inquired into collaterally in this case, for the purpose of affecting the right of the plaintiffs to maintain their suit, unless there was evidence to show that the charter had been ascertained to be forfeited, or the corporation to be dissolved, by the sentence of a court in which those matters had been decided.

And the court refused to give the second instruction without the following qualification, which was insisted on by the plaintiffs, viz:

"But if the jury believe that after the order of the stockholders, authorizing the board of directors to create new stock, the board agreed with the original proprietors that the latter

should surrender a portion of the original stock for the use of the company, and to be sold by the company as original stock instead of creating new stock; and the said original stock was thereupon offered for sale and subscribed for by the defendants; and that the contract thus made was executed by the subscribers receiving the scrip for the stock purchased by them, and that they have claimed the benefit of said contract by receiving dividends on said stock purchased by them, and that the stockholders at a subsequent meeting approved and ratified the act of the board, then the plaintiffs are not precluded from recovering by reason of the stock sold to them being original or old stock substituted as aforesaid, instead of creating new stock."

To the opinion of the court refusing the instructions asked, and giving the addition to the second, the defendants excepted.

The defendants further moved the court to instruct the jury:

1. That if the representations contained in the prospectus and report, as part thereof, are false as to any material fact, constituting an inducement or motive to the subscription for stock by the defendants, by which they have been misled to their injury, and in which the defendants are presumed to have trusted to the plaintiffs, and not to have relied on their own judgment, then the contract founded on such representations is void, and can not be enforced, whether the plaintiffs knew the representations to be false at the time they were made or not, and whether made with a fraudulent intent or not.

2. That the suppression from the prospectus of any fact within the knowledge of the plaintiffs materially affecting the value of the thing to be sold, and inconsistent with the statements in the prospectus, vitiates the contract as fully as the false affirmation of any material facts, if the defendants be injured thereby.

The court gave these instructions, and the plaintiffs excepted.

The plaintiffs then moved the court for the following instruction, viz:

"That if the jury believe from the evidence that all the rep-

resentations made by the plaintiffs in the prospectus and report, as to the description, condition and prospects of the mine, before and at the time of the sale, were in every material particular substantially true as represented, and that the plaintiffs at the time believed, and were justified by the facts known at the time, in believing the ore and mine as valuable as they represented it to be, then that the right of the plaintiffs to recover in this case is not impaired or affected by any proof that the mine and ore did not, when subsequently developed and opened to a greater depth, prove to be as valuable as in the opinion of the plaintiffs so expressed and believed, it was supposed to be; and thus failed to be as productive and valuable as was anticipated at the time of the sale of the stock to the defendants."

This instruction the court refused to give, but at the instance of the defendants' counsel gave the following in lieu thereof, viz:

"If the jury shall be satisfied that the representations contained in the prospectus and the report, as part thereof, were true at the time they were made as to all the material facts constituting an inducement or motive to the defendants to subscribe for the stock, and as to which the defendants are presumed to have trusted to the plaintiffs, and not to have relied on their own judgments, and that no fact within the knowledge of the plaintiffs, materially affecting the value of the thing sold, was suppressed to the injury of the defendants, the subsequent failure of the mine in value and productiveness, and disappointment of the expectations and anticipations of the parties, does not impair the right of the plaintiffs to recover:

"And the subsequent failure of the mine can be relied on by the defendants, only as evidence to affect, so far as it may, the question whether the representations were true at the time they were made."

To the refusal of the court to give the instruction asked for by them, the plaintiffs excepted.

There was a verdict for the plaintiffs for $600, with interest, whereupon the defendants asked the court for a new trial, on the ground that the verdict was contrary to evidence; but the court overruled the motion, and gave a judgment for the

plaintiffs according to the verdict; and the defendants excepted. Upon the application of the defendants this court awarded a *supersedeas* to the judgment.

ROBINSON and LYONS, for the appellants, insisted:

1. That the proof offered to show the organization of the company should have been rejected. That this charter was a private act, and the organization of the company must therefore be proved: *United States Bank* v. *Stearns*, 15 Wend. R. 314; *Rees* v. *Conococheague Bank*, 5 Rand. 326; *Lithgow's Case*, 2 Va. Cas. 297; Bacon's Abr. title Corporations, p. 12.

And although the books of a corporation are competent evidence of their corporate acts, it must first be proved that a corporation exists: Phillips Ev. 1156, in notes; Ang. & Ames Corp. 533.

2. Upon the question whether the company might not cease to exist in some of the modes mentioned in the instructions, without a proceeding against it at the suit of the commonwealth to enforce the forfeiture of its charter, they referred to 4 Com. Dig. title Franchise, 375; *Greeley* v. *Smith*, 3 Story's C. C. R. 657.

3. That the representations of Williams, the agent of the plaintiffs, in the sale of the stock to the defendants, should have been received in evidence. They said that the cases make a distinction between the declarations of the agent made at the time of the contract, and those made before or after: *Fairlie* v. *Hastings*, 10 Ves. R. 123. That the representations of Williams offered in evidence were made at the time of the contract; and these were clearly admissible:

Wescott v. *Bradford*, 4 Wash. C. C. R. 492; 1 Stark. Evi. p. 47, § 21; *Haynes* v. *Rutter*, 24 Pick. 242; *Woods* v. *Clark*, Id. 35; *Hannay* v. *Stewart*, 6 Watts, 487. That he was an agent to sell stock and representations as to the nature, quality, prospects, &c., of the thing sold, were legal incidents of his powers: *Hough* v. *Doyle*, 4 Rawle's R. 291. That the prospectus does not set forth the terms of his agency; indeed does not mention him; and can not, therefore, limit his powers: *Lobdell* v. *Baker*, 1 Metc R. 193; *Locke* v. *Stearns*, Id. 560; *Welsh* v. *Carter*, 1 Wend. R. 185; Story on Agency, 58, 73,

135. That if Williams exceeded his powers, yet when plaintiffs come into court to enforce a contract made by him they ratify his acts, and are bound by his representations: Story on Agency, § 126, 135–139; *U. S. Bank* v. *Davis*, 2 Hill's R. 452; *Campbell* v. *Fleming*, 1 Ad. & E. 40. And they insisted that the question as to the authority of the agent, ought to have been determined by the jury: Paley on Agency, 211.

4. That the court erred in excluding the evidence as to the representations made by Jackson, the president of the company. They insisted that the representations of Jackson were as binding on the company as was the prospectus itself: *Salem India Rubber Co.* v. *Adams*, 23 Pick. R. 256; *Gibbs* v. *Neely*, 7 Watts' R. 307; *Dobell* v. *Stevens*, 3 B. & C. 623; *Pilmore* v. *Hood*, 5 Bing. N. C. 97. That these representations were calculated materially to influence the purchasers of the stock; and even if they were free from all moral fraud, yet if they were untrue in fact and calculated to mislead in any important particular, they were proper to be given in evidence: *Pawson* v. *Watson*, Cowp. R. 788; *Adamson* v. *Jarvis*, 4 Bing. 66; *Foster* v. *Charles*, 6 Id. 396; *S. C.*, 7 Id. 105; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Humphrys* v. *Pratt*, 5 Bligh P. C., new series, 154; *Hazard* v. *Irwin*, 18 Pick. R. 95; *Lobdell* v. *Baker*, 1 Metc. R. 193; *Smith* v. *Richards*, 13 Peter's R. 26; *U. S. Bank* v. *Davis*, 2 Hill's, 452; *Conn* v. *Penn*, 1 Peter's C. C. R. 496.

B. B. MINOR and PATTON, for the appellees, insisted:

1. That the corporation books properly kept are evidence of the organization of the company, and of the regularity of their proceedings: Angell & Ames on Corp. § 373, 374, 567–70, 502; *Utica Ins. Co.* v. *Tilman*, 1 Wend. R. 555; *Hagerstown Turnp. Co.* v. *Creeger*, 5 Har. & John. 122; *Wood* v. *Jefferson Co. Bank*, 9 Cow. R. 205; *Grays* v. *Turnpike Co.*, 4 Rand. 578; *Turnpike Co.* v. *M'Carson*, 1 Dev. & Batt. 309.

2. That no act of forfeiture of a charter can be relied on in a collateral way to defeat a suit by the corporation; but there must first be a proceeding for the purpose of enforcing

the forfeiture, and an ouster of the franchise: *People* v. *Manhattan Co.*, 9 Wend. R. 351; *Trent* v. *Cartersville Bridge Co.*, 11 Leigh, 521; Angell & Ames on Corp. 224–5, and also 82, 84, 85, 86. As to the omission to elect officers, they referred to Angell & Ames on Corp. 106–8, 734–36.

3. That Williams was a special agent to make sale of the stock; that the only evidence of his agency which these defendants had, was his possession of the prospectus and the report of the directors; and these distinctly stated what was to be sold, and described the subject. If, therefore, Williams made any other representations than are contained therein, the defendants were obliged to know, by an inspection of his powers, that he had no authority to make it; and they were bound to look to his powers: Story on Agency, § 76; Angell & Ames on Corp. p. 301.

They insisted that the rule as to an agent of a corporation was the same, or even more stringent than that applicable to agents of private persons: Angell & Ames on Corp. pp. 215, 216, 290, 292; *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Howard* v. *Braithwaite*, 1 Ves & Beame, 202; *Powell* v. *Edmunds*, 12 East, 6; *Whitehead* v. *Tuckett*, 15 East, 400; *Fenn* v. *Harrison*, 3 T. R. 757. And this rule limited the agent strictly by his authority; so that he could not bind his principal for anything beyond it: *Gibson* v. *Colt*, 7 John R. 390; *Delafield* v. *State of Illinois*, 2 Hill's R. 159; *North River Bank* v. *Aymar*, 3 Hill's R. 262; *Mann* v. *King*, 6 Munf. 428; *Hooe, etc.*, v. *Oxley, etc.*, 1 Wash. 19; *Hopkins* v. *Blane*, 1 Call, 362; *Blane* v. *Proudfit*, 3 Call, 207; *Bank U. S.* v. *Beirne*, 1 Gratt. 234; *Union Bank* v. *Beirne*, Id. 226; *Hortons* v. *Townes*, 6 Leigh, 47; *Bryant* v. *Moore*, 26 Maine R. 84; *Brown* v. *Johnson*, 12 Smeade & Marsh. 398; *Bank of Hamburg* v. *Johnson*, 3 Richardson's R. 42; *Schimmelpennich* v. *Baird*, 1 Peter's R. 264; *Parsons* v. *Armor*, 3 Id. 413; *Walker* v. *Smith*, 1 Wash. C. C. R. 152; *Rossiter* v. *Rossiter*, 8 Wend. R. 494; *Jones* v. *Edney*, 3 Camp. R. 285; *Pickering* v. *Dowson*, 4 Taunt. R. 779; *Kain* v. *Old*, 2 B. & C. 627; *Jaques* v. *Todd*, 3 Wend. R. 83.

4. That the court properly excluded the evidence as to the statements of Jackson, the president of the company. He had no authority further than as president; and it was no

part of his official duty to make statements as to the value of the stock, or the condition, prospects, etc., of the company, in order to induce subscriptions: Angell & Ames on Corp. 243, 249, 251; *Hartford Bank* v. *Barry*, 17 Mass. R. 97.

BALDWIN, J., delivered the opinion of the court.

The question presented by the second bill of exceptions taken at the trial is, whether the Circuit Court erred in rejecting the evidence offered by the defendants in these actions for the purpose of proving that the contract upon which the actions are founded was procured from them respectively by false and fraudulent representations made to them at the time, as to the description, condition and value of the subject, by Williams, the agent of the plaintiffs. And the question must be considered upon the hypothesis, that the defendants were able and ready to prove such false and fraudulent representations so made at that time. The first step in the order of such proof was, of necessity, evidence of the declarations and conduct of the agent at the time the contract was entered into; and the decision of the court excluding the representations so made by him, assumes the proposition that, though the contract in question was so fraudulently procured from the defendants, it is nevertheless obligatory upon them.

It can not be doubted that when a contract is made between parties, for themselves as principals, and in an action founded upon it, the defense is that the contract was procured by the false and fraudulent representations of the party seeking to enforce it, his conduct and declarations at the time are parts of the *res gestæ*, and essential elements of the defense. If, therefore, the decision of the court below can be sustained, it must be upon the ground of a distinction, applicable to these cases, between the effect of such a fraud when perpetrated by a principal, and its effect when perpetrated by an agent.

The question whether an agent has transcended the authority conferred on him by his principal in making a contract, usually arises where the other party is seeking to enforce it, and the agent's want of authority is relied upon by the principal as matter of defense against the performance of the contract on his part. But in the present cases, the principals

demand the performance of the contract by the other parties, and, of course, recognize the authority of their agent to procure it, but deny that they can be affected by the alleged false and fraudulent representations employed by him for that purpose. This denial rests upon the alleged ground that Williams was an agent of limited powers, restricted by his principals from making any representations, true or false, on the subject of the contract, and made the mere medium for communicating to purchasers the terms of sale proposed by his principals, and their own representations of the description, condition and value of the property.

But the admissibility of evidence to prove the procurement of a contract by the fraudulent practices of an agent does not turn upon the extent or the limitations of his authority; for if so, then, as the principal may in most cases recognize and confirm the authority of the agent, the consequences of his misconduct would be visited, not upon the person whose confidence enabled him to commit the fraud, but upon its innocent victim. The fraudulent conduct of the agent in procuring a contract may be an abuse of his known authority, or it may be accomplished by means of the suppression or concealment of the limitations upon it; and in neither case can his principal give validity to the contract by repudiating the fraudulent practices employed to obtain it.

That a person professing to act as agent for another, does so wholly without authority, or transcends the authority actually conferred upon him by his principal, is no reason for enforcing the contract against the other party when obtained from him by false and fraudulent representations. In the words of a judicious writer: "Contracts made for the benefit of another, but without his privity or consent, may be rejected or affirmed at his election. But by making the election to affirm it he adopts that which is detrimental, as well as that which is for his benefit. And in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have that effect if proceeding from himself. Every species of fraud, misrepresentation or concealment, therefore, in the agent affects the principal's right to recover": Paley Agency, 324–5.

That an agent to sell is restricted in the delegation of his authority by his principal from making any representations on the subject of the contract, whether true or false, has, it is true, a bearing upon the obligatory force of the contract; but it is as a question of fact, and not as a question of law. It may be used in evidence as tending to prove that the representations of the agent, though false and fraudulent, had not the effect of deceiving the purchaser. But this presupposes that the restraint upon the authority of the agent was known to the purchaser; and whether he knew it, and the effect of such knowledge in preventing him from being deluded, deceived and defrauded, are also questions of fact for the consideration of the jury.

It is difficult to conceive a case of an action founded upon a contract of sale, to which the defense is that it was obtained by fraud, in which the acts and declarations, whether of the principal seeking to enforce the contract, or of his agent through whose intervention it was procured, occurring at the time of making it as part of the *res gestæ*, are inadmissible evidence.

Such a defense does not present a naked question of law for the decision of the court; but a mixed question of law and fact for the consideration of the jury, with the aid of such instructions as the court may give in regard to the principles of law applicable to the facts that may be proved to the satisfaction of the jury.

The bill of exceptions shows nothing to render these cases an exception to the general rule of evidence just mentioned.

It appears therefrom that the contract in question consisted of a written prospectus on the part of the plaintiffs, in the form of a subscription paper, to be signed by the purchasers, for the sale of a number of shares of reserved stock of their Gold Mining Company, upon the terms and conditions therein prescribed, representing the mines to be in full and successful operation, with several particulars of description and recommendation, and referring to the last report of the president and directors of the company for a full description of the mine, buildings, machinery, etc., which subscription paper was signed by the defendants and others. The plaintiffs also gave in evidence a report of the president and directors of

the company to the stockholders, containing a detailed and favorable description and statement of the condition of the mining property, and of the operations, resources and prospects of the company, as being the report referred to in the prospectus; but it does not appear that it was shown to the defendants, or was called for by them, or that the prospectus itself was read to or by them, except so far as it may be inferred from their having subscribed it. It further appears that Williams was an agent of the company for effecting the contemplated sales of the stock upon the terms and conditions prescribed in the prospectus; but the extent or limitations of his authority do not appear, except so far as may be inferred from the facts above mentioned, and the recognition of his agency by the act of the company in seeking to enforce the contract in question. Upon this state of facts, the defendants offered to prove that Williams, at the time of procuring the subscriptions of stock from them, and for the purpose of inducing them to subscribe for and purchase the same, made representations, in addition to those contained in the prospectus and report therein referred to, as to the description, condition and value of the gold mine, upon the faith of which the defendants became subscribers for said stock; which representations were false and fraudulent; and for the purpose of getting such proof, asked a witness to state what representations were made to the defendants as aforesaid, touching the value and description of the mine and condition of the company; whereupon the counsel for the plaintiffs objected to the question and any answer thereto, upon the ground that it was incompetent for the defendants to give evidence of any representations by said Williams, because they insisted that he was a limited agent, whose authority was defined by the said prospectus, and the report of the president and directors therein referred to.

We are of opinion, for reasons above suggested, that the Circuit Court erred in rejecting the evidence so offered by the defendants, upon the ground urged on the part of the plaintiffs, and if the propriety of its rejection on any other ground could be considered by this court, as to which we express no opinion, none such appears from the bill of exceptions. The evidence relied on by the plaintiffs, as proving acquiescence in

and recognition of the contract on the part of the defendants, was proper for the consideration of the jury, in connection with all the circumstances of the case, and the principles of law applicable thereto, but could not be used by way of estoppel, for the purpose of excluding the evidence of fraud offered by the defendants.

The court is further of opinion, that the Circuit Court did not err in the rejection of the declarations of Jackson, the president of the company, as stated in the third bill of exceptions, upon the assumption made by that court, that he was identified as the person who made them, inasmuch as it does not appear that he acted as the authorized agent of the company for the purpose of making sales of the stock above mentioned.

And the court is further of opinion, that there is no error in the several decisions of the Circuit Court, rejecting proposed instructions, nor in the actual instructions given, as set forth in the several bills of exception in relation thereto.

The court, therefore, without considering whether the bill of exceptions to the refusal of the Circuit Court to grant a new trial was properly taken, is of opinion that the judgments must be reversed for the error of that court in rejecting the evidence offered of the declarations of Williams, as stated in the second bill of exceptions.

Judgments reversed, with costs to the plaintiffs in error, verdict set aside, and new trial directed.

TROWBRIDGE v. SCUDDER ET AL.

(11 Cush. 83. Supreme Court of Massachusetts, 1853.)

[1] **Stockholders' liability as partners.** Stockholders of a mining corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company.

[1] Parties wrongfully assuming corporate name held as partners: *Hill* v. *Beach*, 12 N. J. Eq. 31; *Abbott* v. *Omaha Co.*, 4 Neb. 416; 4 M. R. 8. See *Mexican Co., In re*, 2 M. R. 36.

Assumpsit, in which the plaintiff declared specially upon the following promissory note:

"$800. BOSTON, Feb. 22, 1849.

Four months after date, I promise to pay to the order of C. A. Trowbridge, eight hundred dollars, value received, with interest.

JOSEPH M. BROWN, Treasurer,
Ontonagon Copper Co."

Under the common counts, six other notes were specified of the same form, for different sums, and payable at different times, and all indorsed in blank by C. A. Trowbridge. The writ was dated Oct. 22, 1849; and the defendants, residing in this commonwealth, were sued as partners doing business under the name and style of the Ontonagon Copper Company. At the trial before DEWEY, J., the plaintiff offered in evidence the act of incorporation of the Ontonagon Copper Company, and called Joseph M. Brown, who testified, that the said company was organized April 16, 1846, and has existed ever since. He produced and verified the books of the company; he also verified certain letters of credit signed by him, authorizing C. C. Cushman to draw on him as treasurer; also, certain letters, written by him as treasurer of the company to the plaintiff.

He further testified, that it appeared, by the books of the corporation, that Scudder and Hobbs, two of the defendants, were original members, and still continued such; that Coffin, another defendant, became a member May 15, 1846, and continued such till August 22, 1849; that Brockway, a fourth defendant, became a member November 14, 1846, and always continued such; that two of the defendants, Scudder and Hobbs, were directors in 1848 and 1849; that said company had never done any thing in or concerning the business of manufacturing copper in Salem, Massachusetts; that in April, 1846, they engaged in the business of mining copper in Ontonagon county, Michigan, taking a lease of government lands for that purpose, and never had engaged in any other business; but that no ore, except specimens, had been received in Massachusetts from the mines; that letters, containing reports of investigations and operations at the mines, were from time to

time received from persons in the employ of the company, and read at annual and special meetings of the company in Boston; that he recollected that Scudder, Hobbs and Coffin were present at such meetings. They resided in Boston; that he did not remember seeing Brockway there; he resided in Newburyport; the records did not always show who were present; that he had frequently conversed with Scudder, Hobbs and Coffin in relation to the mining business, and did not remember conversing with Brockway but once before this suit was commenced, when he, Brown, went to Newburyport to obtain payment for an assessment; but could not say certainly that any conversation passed, except on the subject of the assessment; had seen and conversed with Brockway since this suit was commenced; he never intimated ignorance of the affairs of the company.

He further testified that no assessments had been paid when he became treasurer; that all the assessments were laid after the company engaged in the mining business; that eight assessments were voted at different meetings of the company, the defendants, Scudder, Hobbs and Coffin, being present; and that all the defendants paid part or all of the assessments upon their respective shares.

He further testified that supplies of gunpowder, tools, provisions, etc., for the mines were obtained at the West, by vote of the company; and that the plaintiff furnished two bills of supplies; one bill at his, Brown's directions, given by telegraph to the plaintiff in October, 1848, and the other a short time previous, by the orders of one Cushman, an agent of the company in Michigan, authorized to act in the premises by letters of credit from, and votes of, the company; that the obtaining of these supplies was, to his knowledge, known to the defendants Scudder, Hobbs and Coffin, and that Scudder and Hobbs, two of the defendants, who were directors, were consulted by him in relation to the ordering of supplies, and that he ordered them with their immediate advice and approval; that the plaintiff drew on him as treasurer of the company, by his directions, for the supplies furnished by his order, and presented for payment the drafts of Cushman on the company, in the plaintiff's favor, for the supplies furnished by Cushman's order. He further testified that all these

drafts were accepted by him for the company, and were protested for non-payment; that the plaintiff came to Boston and rendered an account of the drafts, costs of protest, etc.; that there was then due the plaintiff the sum of $3,020.52; and that he, Brown, having consulted the directors, Scudder and Hobbs, and with their approval, gave the notes in this suit, in behalf of the company, amounting to $3,020.52, to the plaintiff, for the drafts and other items of his account; that the fact that the plaintiff furnished supplies to the amount claimed in this suit had never been disputed.

Upon this evidence, and upon the books, letters, and papers thus introduced, the presiding judge proposed to rule that this action could not be maintained, and by consent, a nonsuit was entered, subject to the opinion of the full court on the foregoing evidence.

R. CHOATE & J. S. HOLMES, for the plaintiff.

E. D. SOHIER & C. A. WELCH, for the defendants.

METCALF, J.

The Ontonagon Copper Company was incorporated by Stat. 1846, c. 270, "for the purpose of manufacturing copper in the city of Salem, county of Essex, with all the powers and privileges, and subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes." The act of incorporation was accepted, and the company organized under it. The defendants were members of the corporation when it was organized, or have since become such. The company never manufactured copper in Salem; but it engaged in the business of mining copper in Michigan for the purpose of procuring copper ore to be sent to Salem to be manufactured. And its treasurer, with the approval of the directors, gave the notes now in suit, for expenses incurred in that business of mining. That business was unsuccessful, and the company is insolvent. The plaintiff now seeks to recover of the defendants, as partners, the amount of the notes, in an action of *assumpsit*. The first ground taken by the plaintiff is, that there is no corporation; that the acceptance of the incorporating act, and the organization and choice of officers under it, did not produce a corpo-

rate existence; that corporate action, in the business for which the legislature offered a charter, was necessary to make a corporation; and that, as no such business was done by the company, it is still only a collection of individuals, without corporate powers, privileges, or liabilities. These seem to the court to be wholly unwarranted propositions. But we need not so decide; for if they were sound, they would not authorize the plaintiff to treat the members of the company as partners: *Fay* v. *Noble*, 7 Cush. 189.

The next ground taken by the plaintiff is, that the company, even if it be a corporation, had no authority, by its incorporating act, to make contracts for mining in Michigan; that its only authority was to manufacture copper in Salem, and make contracts necessarily incidental to that business; that contracts for mining are not thus incidental; that the company is not legally liable on those contracts; and therefore that the members of the company are personally liable thereon as partners, in a suit on the notes. We do not admit these premises. But if we held them to be correct, yet the conclusion which the plaintiff deduces from them would not follow. The notes, on their face, though signed by the treasurer of the company, are not his notes, but legally purport to be the notes of the company: Angell & Ames on Corp. 4th ed. § 293. But, admitting that the company is not liable on these notes, as a corporation, yet it does not follow that its members are liable in a suit thereon. They may or may not be liable to the plaintiff in some form of action, according to circumstances. The members of a corporation may doubtless so manage its concerns as to render themselves personally responsible to those with whom they deal. If they, in the name of the corporation, give notes which the corporation is not bound to pay, and which it refuses to pay, they may, in many supposable cases, be held to indemnify the holders of such notes. The remedy against them, however, should not be by an action on the notes, but by an action of tort, as is the remedy against one who signs a note as agent for another, without authority: *Ballou* v. *Talbot*, 16 Mass. 461; *Jefts* v. *York*, 4 Cush. 371; *Jenkins* v. *Hutchinson*, 13 Ad. & El. N. R. 744.

Nonsuit confirmed.

CARR v. CHARTIERS COAL COMPANY.

(25 Pennsylvania State, 337. Supreme Court, 1855.)

[1] **Extra pay to secretary.** The secretary of a private corporation, at a fixed salary, can not recover extra pay for services in that capacity.

Error to the District Court of Alleghany County.

The action below was *assumpsit* by the Chartiers Coal Company, an incorporated body, to recover from its secretary, Carr, the defendant below, $200 retained by him beyond his annual salary, for extra services which he claimed to have rendered the company in numbering, filling, and countersigning coupon bonds issued by the company. The cause being submitted to the court below upon a case stated, judgment was entered for the plaintiff below, to reverse which the defendant sued out this writ.

MELLON and STANTON, for plaintiff in error.

The presumption of law and of fact is, that the annual salary compensated no more than the regular and defined duty; and it being shown that this duty was not within the enumeration, and it being admitted to have been worth the full amount of $200, the law implies an undertaking to pay for it. The work being shown to be extra, is therefore entitled to extra compensation; for it is a well established principle of law "that, if work additional to that contemplated in the original contract be done at the request of the party benefited by it, he will be liable therefor, upon an implied promise to pay for it: Story on Contracts, § 15, citing *Lovelock* v. *King*, 1 Moody & Rob. 60; *Dubois* v. *Canal Co.*, 12 Wend. 334; *Damin* v. *Granby*, 2 Pick. 345; *Hoadly* v. *McLean*, 4 Manning & Scott, 340.

The opinion of the court was delivered by BLACK, J.

A person employed as the secretary of a private corporation, at a fixed rate of compensation, can not demand extra pay for services in that capacity, which were not anticipated

[1] *Fraylor* v. *Sonora Co.*, 17 Cal. 594; *Merrick* v. *Peru Co.*, 61 Ill. 472; 3 M. R. 583.

at the time of his appointment, or which were not enumerated in the charter or by-laws. The fair construction of his contract is, that he will do whatever his employers may have occasion to employ a secretary about.

Judgment affirmed.

CARR v. LE FEVRE. LE FEVRE v. CARR.

(27 Pennsylvania State, 413. Supreme Court, 1856.)

Stock, Calls paid by payments to creditors—Presence at meeting of directors—Inference. Carr subscribed for 250 shares of the capital stock of The Chartiers Coal Company, the par value being $20 per share; he paid in cash $10 per share and also received a receipt for $2,500 more on account of coal lands and contracts, conveyed by one Remington to the company, thus balancing the charge for his stock, $5,000. The act of incorporation provided that each stockholder in a corporation should be individually liable for its debts to the amount of the balance unpaid on his stock. The company issued bonds to the amount of $60,000 for the purpose of meeting liabilities; and afterward at a meeting of the directors, Carr being one of them and present, it was resolved that a prospective value had been placed upon the lands conveyed by Remington to the company, that only $10 per share had been paid on the stock; that $10 more per share be called in, and that stockholders neglecting to pay the additional installment might return their old certificates and receive new certificates to the amount of their actual cash payments. Carr tendered his original certificate and demanded a new certificate to the amount of his cash payment, which was refused. Upon suit by a bondholder against Carr to recover a sum alleged to be due and unpaid on his stock subscription, it was *held* that the receipts for land were good payments on the stock which could not be affected by an after discovered error in the judgment of the company as to the value of the lands. That the resolutions were binding only on the stockholders who consented to them. That the presence of Carr at the meeting authorized no other inference than that he assented to them as a whole, and if he thus assented, he had a right to avail himself of the provisions for those who were unable or neglected to pay the additional installment.

Bonds payable to bearer. The bonds of a coal company, incorporated by the legislature of Pennsylvania, payable to bearer, will pass by delivery, and the holder may sue in his own name.

Error to the District Court of Allegheny County.

This was an action of debt by George Le Fevre against S.

Watson Carr, to recover four bonds amounting to $2,500, payable to John Thompson, or bearer, issued by the Chartiers Coal Company, incorporated by the legislature of Pennsylvania. The special verdict finds the following facts in the case: The capital stock of the company was not to exceed $200,000, in 10,000 shares of $20 each, and by the act of incorporation, it was provided that each stockholder shall be liable in his individual capacity for the debts and performance of all contracts entered into by the company, to the amount of the balance unpaid on the stock of said stockholder, so that the subscribed stock of each stockholder shall be liable for the said debts and contracts. On the 7th of February, 1850, the whole of the stock was subscribed; 250 shares being taken by the defendant, who at the time paid $500 on account of his subscription. On the 18th October following he received the company's certificate for 250 shares. On the 20th August, 1850, the treasurer of the company drew on Carr for $375, the amount of the sixth and last installment due on his stock.

In their stock ledger, on the 9th February, 1850, the company charged themselves with certain coal lands, contracts for harbor, and lands at harbor, assigned and conveyed by one Remington to the company, valued and appraised at $100,000, and receipted for by Remington to the subscribers to the capital stock of the company, among whom was Carr, who had a receipt for $2,500. This sum, with his cash payments of $10 upon each share, appeared on the books of the company to his credit, balancing the charge for his stock, $5,000.

On the 1st of October, 1850, the president and directors of the company (Carr being one of the directors, and secretary, and present at the meeting), for the purpose of raising means to meet the existing liabilities of the company contracted in the construction of their road, etc., authorized bonds of the company to be issued to the amount of $60,000, in sums of not less than $100, nor exceeding $1,000, bearing interest at the rate of 6 per cent per annum, redeemable in three years from their respective dates. Of the bonds so issued the four in this suit are part, and being payable to Thompson, or bearer, Le Fevre became the holder of them without any transfer in writing from Thompson, who was a stockholder and treasurer of the company.

At a meeting of the directors of the company, Carr being present, the following preamble and resolutions were adpoted:

"WHEREAS, But $10 on each share of the capital stock have been called in or paid by the stockholders; and whereas, on the organization of this company a prospective value or estimate was placed upon contracts or lands conveyed to the company by Z. W. Remington; and whereas, contrary to the estimates at the time of the organization of the company, $100,000 cash subscriptions proved insufficient to carry out the plans and purposes contemplated by their charter, therefore,

"*Resolved*, That it becomes a duty imperative on this board to require and demand the additional unpaid installment of $10 per share on each share of stock issued or subscribed, to be paid into the company forthwith.

"*Resolved*, That the bonds of the company heretofore issued will be received in the payment of the said additional installments.

"*Resolved*, That the stockholders unable or neglecting to pay the said additional installment on each share, may return their old certificates and receive therefor new certificates for stock to the amount of their actual cash payments.

"*Resolved*, That the secretary furnish the stockholders with a copy of the foregoing resolutions."

After the passage of these resolutions, and before Le Fevre became the holder of the bonds sued on, Carr having paid the $2,500 cash, being ten dollars per share, and being unable, and having neglected, to pay the further sum of $10 per share, tendered to the president of the company his original certificate for 250 shares, and demanded a new certificate of stock to the amount of $2,500, his actual cash payment, which new certificate the president refused to give.

Judgment was entered upon the special verdict in favor of defendant. This was the error assigned by Le Fevre, plaintiff in error.

Before the case stated was agreed upon and submitted to the court, Carr, the defendant, demurred to the plaintiff's declaration and made the following points:

1. There is no privity of contract between the plaintiff and defendant, and the defendant can only be chargeable by force of charter; the proviso affords a security "for the debts

and performance of all contracts entered into by the company to the amount of the unpaid stock," and was designed as a general protection to the creditors of the company in case of its insolvency, and not to give an action to any particular creditor for his own exclusive benefit.

2. If an action could be sustained by any particular creditor on his claim, it can not be done until said claim be established by judgment against the company, for individual stockholders can not be required to contest the claims against the company, and are not supposed to be provided with the means of defense against them.

3. If the plaintiff be a *bona fide* holder of the bonds or creditor of the company, his remedy is, first to obtain judgment against the company, and then by bill in equity, in his own behalf and in behalf of such other creditors as there may be, to enforce the liability.

The court, HAMPTON, P. J., overruled the demurrer, and entered judgment of *respondeat ouster* thereon. This judgment, and the admission in evidence of the four bonds, the books and charter of the company, were assigned by Carr for error.

HAMILTON, for Le Fevre, plaintiff in error.

MELLON & STANTON, for Carr, defendant in error.

LEWIS, C. J.

This is an action by the holder of several bonds of "The Chartiers Coal Company," against a stockholder in said company, to recover a sum alleged to be due and unpaid on his subscription to the stock. The action is brought under that clause in the charter which declares that "each stockholder shall be liable in his individual capacity, for the debts and performance of all contracts entered into by said company to the amount of the balance unpaid on the stock of said stockholder, so that the subscribed stock of said company, whether paid in or not, shall be liable for said debts and contracts:" P. L. 1850, p. 940. The defendant below alleged that the stock taken by him was paid up in full, and the special verdict

finds the facts in the case. We are to decide whether the facts so found amount to a payment or not. It appears from the verdict of the jury, that 250 shares were subscribed by the defendant on the 7th February, 1850, the par value of which amounted in the aggregate to $5,000. It further appears from the entries in the stock ledger of the company, set forth in the verdict, that "conveyances of coal land in fee, contracts for coal land, contracts for harbor, and lands at harbor, etc., as per conveyances and assignments of Z. W. Remington to the company" were "valued and appraised at, and receipted for by Z. W. Remington to the original subscribers to the capital stock of the company." The amount credited to S. Watson Carr on this account, for money receipted for by Z. W. Remington, is $2,500. The residue of Mr. Carr's subscription was paid in cash. The jury find that each stockholder paid in cash only ten dollars on each share, and was credited on the books with the additional sum of ten dollars per share, "in the lands and contracts aforesaid." There is nothing in the special verdict tending to show that there was any fraud in this transaction. The charter authorized the company to "purchase land not exceeding 1,000 acres," and "to employ its capital in purchasing and holding the lands aforesaid, with the improvements," etc. There was, therefore, nothing in this arrangement with Remington which exceeded the corporate powers of the company. The corporation, being indebted to Remington for the lands necessary for its business operations, was bound to collect the subscriptions to its stock, and to pay the money over to Remington in satisfaction of that debt. A payment by the stockholders directly to Remington, with the assent of the corporation, produced the same result, and was in law a good payment *pro tanto* on their several subscriptions to the stock.

In making their contract with Remington, the parties took the precaution to have the "lands valued and appraised." We are bound to presume that this was fairly done. There is nothing in the verdict to repel this presumption. It is true that the preamble to the resolutions of the 11th March, 1852, two years after the payment, states that, "on the organization of the company, a prospective value or estimate was placed on contracts and lands conveyed to the company by Z. W. Rem-

ington, and that, contrary to the estimates at the time of the organization of the company, $100,000, in cash subscriptions, proved insufficient to carry out the plans and purposes contemplated by this charter." What has Mr. Carr to do with an error in the judgment of the company in regard to the value of their purchase from Remington? If, through errors of judgment in carrying on their business, they find themselves unable to "carry out their plans," what is that to him? If they took lands at a "prospective value" never realized, it is nothing more than many individuals and corporations have done before. Such an error in management or in their judgment of the value of a purchase, made without fraud, forms no ground for rescinding the contract. Even if Mr. Carr had been the owner of an interest with Remington in the lands conveyed to the company, the contract could not be rescinded without his consent. But, as we understand the verdict, it does not appear that Mr. Carr had any interest in the lands whatever. We infer from the facts stated in it, that he satisfied $2,500 of Remington's claim against the corporation, and in consideration of doing so, received a credit for an equal amount on his subscription to the stock. This transaction was neither illegal nor improper. It could not be invalidated by the subsequent discovery that the company had made a bad bargain with Remington. Nothing short of Mr. Carr's voluntary consent could give validity to the resolutions of the 11th March, 1852, invalidating the payment made by him through Remington. No inference can be drawn from his presence, when the resolutions were adopted, beyond that of his assent to them as a whole. If he did assent to them as a whole, he had certainly a right to avail himself of the provisions made for those who were "unable or neglected" to pay a second time. The verdict finds that he belonged to that class, and that he tendered his old certificate and offered to receive a new one for one half the amount, according to the resolutions, and that this was refused by the president of the company.

We are of opinion that Mr. Carr's subscription to the stock of the company was paid up in full by cash for one half of it, and the arrangement with Remington for the other half; that the resolutions of 11th March, 1852, invalidating that

payment, are binding only on those who consented to them; that the presence of Mr. Carr when the resolutions were adopted, authorizes no other inference than that he assented to them as a whole; and that he has fully complied, or offered to comply, with the terms of the resolution which provided for cases like his own.

This view of the case renders it unnecessary to consider the other points. But we do not desire to have any doubt on the question whether the holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name. Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name. Possession is *prima facie* evidence of ownership.

The judgment of the court below is correct.

Judgment affirmed.

COLEMAN V. THE COLUMBIA OIL COMPANY.

(51 Pennsylvania State, 74. Supreme Court, 1865.)

Shares of stock bought in by company. An oil company having bought in shares of its own stock, afterward divided them among the then stockholders *pro rata;* a stockholder who, between the time of the purchase and the time of such distribution, had assigned a part of his stock, sued the company for a *pro rata* of the shares, on the basis of the number held by him at the time of purchase. *Held*, that, his action is an affirmance of the purchase, and he can not allege that the company's funds were misapplied; and that as to him, the distribution on the number of shares held by him at the time of distribution was equitable.

Error to the Court of Common Pleas of Allegheny County.

The Columbia Oil Company was incorporated by the legislature with a capital stock of 10,000 shares.

April 9, 1863, the company purchased 400 shares of its stock from Charlotte Wagefarth, at which time Coleman was

the owner of 600 shares. Prior to October 1, 1863, he had transferred 500 shares, leaving 100 shares still owned by him. January 13, 1864, by resolutions of the stockholders the 400 shares purchased from Wagefarth were divided *pro rata* among the stockholders, except 8 shares, which were sold at $83 per share, and the proceeds divided *pro rata.* Under this arrangement the division to the plaintiff was made upon the basis of the 100 shares owned by him at the time of the division. The plaintiff demanded that his share of the stock purchased by the company should be determined upon the basis of the 600 shares owned by him at the time of the purchase, and refused to receive the dividends upon the additional shares, or to recognize the act of the company in making the purchase.

In July, 1864, the original shares of stock were divided into five shares each.

Upon the trial, the jury were instructed to return a verdict for the plaintiff, for the market value of his *pro rata* share of the 400 shares of stock, based upon his being entitled to a division upon the 600 shares, which he owned at the time the stock was purchased from Wagefarth. The question whether the plaintiff was entitled, under the evidence, to recover upon the basis of the amount of stock owned by him at the time of the purchase, was reserved for further consideration by the court.

Upon this question the court (STOWE, A. J.) delivered the following opinion:

"If the defendant has a legal right to purchase the stock in question under its charter, it is clear that the stock became, like any other property properly acquired, the general property of the corporation, and continues so till set aside for the individual stockholders by the proper authority, and plaintiff can not recover; and even if the company had not a right to acquire this stock in the manner it did, plaintiff can not recover unless the purchase, instead of vesting the stock in the company, as general corporate funds, vested the right to it in the individual stockholders, in proportion to the stock held by them at the time, the corporation being merely trustee for them individually.

"Without undertaking to base my opinion in this case

upon the assumption, I am of opinion that a corporation, under its general corporate powers, may purchase its own stock, when the act is done in good faith for the benefit of the corporation. But even granting such not to be the case, and admitting that the purchase of the 400 shares of stock in this case was not authorized by law, I can not see how the stock purchased can bear any other relation to the stockholders or the corporation than did the money with which it was purchased. That was corporate funds, held in trust for the stockholders in their corporate capacity, and if it was misused by obtaining with it other property, it seems to me the property purchased must be treated as held under the same trust. If this view is correct, the plaintiff acquired no individual right to the stock claimed by him by virtue of its purchase by defendant, and therefore is not entitled to maintain this action.

"Let judgment be entered upon the question of law reserved for defendant, *non obstante veredicto*, upon payment of verdict fee."

Assignment of error: The court erred in entering judgment for the defendant on the reserved question.

HAMILTON & ACHESON, for plaintiff in error.

JAS. LEECH, for defendant in error.

WOODWARD, C. J.

The plaintiff owned 600 shares of the capital stock of the company when the company, on the 9th of April, 1863, by regular corporate action, purchased 400 shares of Mrs. Wagefarth. The company continued to hold these 400 shares until the 13th January, 1864, when, by formal resolution of the stockholders, they were divided among the then stockholders *pro rata*, upon the basis of the shares then held by the stockholders respectively. Between the time of the purchase and the time of the distribution of the 400 shares, the plaintiff had sold and assigned 500 shares of his stock, so that at the distribution he held but 100 shares. He claims that he was entitled to a *pro rata* of the 400 shares purchased of Mrs. Wagefarth upon the basis of the number of shares owned by him when the purchase was made, and not upon the basis of

the shares owned by him when the division was made; and to enforce this claim he brought suit against the company.

The learned counsel of the plaintiff admit that a corporation may, from necessity, take its own stock in pledge or payment, as a lawful exercise of the corporate franchise, but they deny that the purchase in question was the exercise of a corporate franchise, or was justifiable upon any principle of necessity, and they maintain that it was the voluntary and gratuitous act of the directors, wholly outside of their official powers and duties.

Suppose this be fully admitted, can it be doubted that the plaintiff's action is in affirmance of the purchase? If he meant to disaffirm it, he should have sought an injunction against the company to restrain the purchase, or to cancel it, if done before he had knowledge of it, or, if he would bring an action at law, he should have declared for his share of the funds which he complains were misapplied in buying the 400 shares. Instead, however, of disaffirming the purchase in any manner, he affirms it, and claims his full share of the speculation. And he claims it against the company, and not against the directors merely, who misapplied the funds, affirming thereby that it was a corporate act, and that, as one of the corporators, it enured to his benefit. This is the circumstance which prevents us from considering the transaction as a breach of trust. Whatever we might think of it in a different proceeding, we can, in this action, regard it in no other light than a valid corporate act. And for this reason the case of *The London and Birmingham Railway Company* v. *Carpenter's Executors*, 13 L. & E. R. 201, has no application, no more than the other cases cited to prove that the *charter* having divided the stock into a certain number of shares, it was not competent for the company to change or diminish the number. If the company have violated the law of its being, or been guilty of a breach of trust, let appropriate proceedings be instituted against it, but let us not be asked to convict it of these high misdemeanors before they are alleged in pleading, and that in an action, too, which affirms, approves and claims the fruits of the very act we are asked in argument to condemn.

The employment of corporate funds to speculate in the stock of the company to which the funds belong, is not a practice to

be encouraged, but the present plaintiff is not in position to censure the practice. As to him, we must regard the purchase as valid and fair; and all we have to decide is how far it enures to his benefit.

We think the court below gave satisfactory reasons for the judgment they entered. When a company buys in shares of its outstanding stock, it enriches the shares of every holder; for, whether the purchased shares be sunk, or sold at a profit, or distributed *pro rata* among the stockholders, the chance for an increase of dividend or of shares enhances the value of each existing share—enhanced the value of the 600 shares held by the plaintiff. When he sold 500 shares of his stock, he got, or ought to have got, the benefits of this enhancement, and he ought surely to let his vendees, who paid the market price, take all they purchased; not only the shares themselves, but also the incidental right of those shares to participate in the distribution of the Wagefarth stock.

As well might he dispute the right of his vendees to receive dividends, as to receive a *pro rata* distribution upon the stock they purchased of him. As well might he deny their right to the stock itself as to deny them the incidental advantages of the stock.

The judgment is affirmed.

UNION WATER CO. v. MURPHY'S FLAT FLUMING CO. ET AL.

(22 California, 620. Supreme Court, 1863.)

Statute of limitations—Mortgage. An action to foreclose a mortgage, no written obligation to pay the money secured by it having been executed, is, nevertheless, an action founded upon an instrument of writing, and is not barred until four years after the cause of action accrues.

Loan of money by water company not ultra vires. When the charter and the statutory law are silent as to what contracts a corporation may make, it has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created, and none other. The mere fact that a corporation, organized for the purpose of constructing ditches for the conveyance and sale of water, makes a loan of money, does not, of itself, make such contract void as an act exceeding its corporate powers. Such a

contract may be necessary to enable it to attain the object for which it was created. In the absence of proof, its validity will be presumed.

Violations of charter not collaterally investigated. A contract made by a corporation, which is not authorized by its charter is not void, and its validity can not be investigated in a collateral way by individuals; it must be done by the government in a direct proceeding.

Mortgage of flume—[1] Indivisibility—In the nature of real estate. A mortgage upon a mining ditch or flume in course of construction, and purporting to grant, not only the work as it stood, but as it should be when completed. *Held*, valid as against the entire flume, and not to be limited to the part constructed at its date, in favor of a later mortgage. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon.

Decree amended relative to surplus proceeds of sale. The Supreme Court will not reverse a judgment because the decree in a foreclosure suit does not provide for the disposition of the surplus proceeds of the sale, but will itself amend the decree.

Appeal from the Sixteenth Judicial District.

The "Union Water Company," plaintiff, was a corporation formed under the general law, for the purpose of conducting water through certain ditches to mining districts, and the Murphy's Flat Fluming Company, defendant, was also a corporation formed in the same manner for the purpose of constructing a flume to be used in mining operations. March 5, 1858, the latter company executed to the former a mortgage, by which, in consideration of the sum of $10,000, expressed to have been paid by the mortgagee, it conveyed "all and singular the right, title, interest, and possession, as well in equity as in law, which the said party of the first part has, or may have, in and to that certain sluice and flume known as the sluice and flume of the said party of the first part, situate in said county of Calaveras, at and near Murphy's Camp, and extending from Murphy's Flat to a point below on Angel's Creek, together with all right, privilege, or benefit, in and to the water passing, or to pass through said flume or sluice; and in and to the waters of Murphy's Flat; and in and to all and every the waters of Angel's Creek, and which may be, or come to be in the possession of the said party of the first part; and as well the said sluice and flume when completed; and all and every part thereof; and so much thereof as is now complete;

[1] *Reynolds* v. *Hosmer*, 51 Cal. 205; *Post* DITCH.

and all rights, benefits, and privileges which may accrue to the said party of the first part under a certain agreement," etc.

The consideration of the conveyance recited that, "whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of $10,000, money loaned, payable in eighteen months from the date hereof, with interest," etc. If, therefore, the said indebtedness should be duly paid, the conveyance should be waived; but otherwise, of force.

No note accompanied the mortgage, nor was there in it any direct promise to pay the debt.

At the time of the execution of this mortgage the flume mentioned therein was in process of construction and was completed for a distance of only 1,200 feet. May 15, 1858, and after the flume was finished for a distance of 3,600 feet, the Murphy's Flat Company executed a second mortgage thereon to one Traver for some $4,000, to secure a note for that amount executed to him at the same time.

The action was commenced by plaintiff, June 4, 1862, to foreclose its mortgage, and Traver, as subsequent mortgagee, was made a party defendant. The mortgagor made no defense. Traver plead the statute of limitations, denied the power of plaintiff to make the mortgage contract—and claimed that no property was covered by plaintiff's mortgage except the portion of the flume in existence at the date of its execution.

The plaintiff had judgment for a foreclosure and sale of the whole property and application of the proceeds to its debt. The decree barred the rights of Traver in the property, and contained no direction as to the disposition of any overplus which might remain after application of the proceeds to plaintiff's debt.

From this judgment the defendant Traver appeals.

H. O. BEATTY, for appellant.

P. L. EDWARDS, for respondent.

CROCKER, J., delivered the opinion of the court—COPE, C. J., and NORTON, J., concurring.

This is an action to foreclose a mortgage. No note or other written obligation to pay the money appears to have

been executed, nor does the mortgage contain any covenant or agreement to pay the mortgage debt. The action was commenced more than two years and less than four years after the time of payment of the money specified in the mortgage, and the appellant therefore contends that the action is barred by the statute of limitations. It is true that in the absence of a direct agreement to pay the money specified in the mortgage, the plaintiff is confined to his remedy against the mortgaged property, and can have no personal judgment against the mortgagor: *Shafer* v. *The Bear River and Auburn W. and M. Co.*, 4 Cal. 294; *Brooks* v. *Maltbie*, 4 Stew. & Porter, 96; *Hunt* v. *Lewin*, Id. 138; *Hickox* v. *Lowe*, 10 Cal. 210. But it does not follow that because there is no personal liability the action is barred in two years. The action is upon a contract "founded upon an instrument of writing," to wit, the mortgage, and is not therefore barred until four years after the cause of action accrued. This point, therefore, is not tenable.

The next point is that the Union Water Company, being a corporation, had no right to loan money or to take mortgages. The act of April 14, 1853, under which the plaintiff was organized, confers upon corporations of this character power "to make by-laws, not inconsistent with the laws of this State, for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company." This is a direct vesting of power in the corporation, and is to be construed accordingly; and under it this court has held that a corporation has power to make promissory notes, not as an express power, but as an incident to those powers: *Smith* v. *Eureka Flour Mills*, 6 Cal. 1. Independently of this special statutory provision, the common law annexes to a corporation, when created, certain incidents and attributes, and there are several powers and capacities which tacitly and without any express provision are considered as inseparable from every corporation, among which is the power to make contracts and contract obligations: Ang. & Ames on Corp., sec. 110. These incidental powers are, however, regulated and limited by the act or charter of incorporation. The general principle is, however,

that a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. That is, the general powers of a corporation must be restricted by the nature and object of its institution: 1 Cal. 356, 452; 2 Id. 538; Ang. & Ames on Corp., sec. 111. It has been properly held that the general powers incident to bodies corporate are restricted by the nature and object of the institution of each, and every such corporation has power to make all contracts that are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law or the provisions of its charter: *Barry* v. *Merchants' Exchange Co.*, 1 Sandf. Ch. 280, where this question is fully examined; Ang. & Ames on Corp., sec. 257.

When the charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created, and none other: Id. sec. 271. The dealings of a corporation which, on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized, without some evidence to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, they, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men: Id. sec. 111; *Chautauque County Bank* v. *Risby*, 19 N. Y. 369, 381.

The mere fact that a corporation, organized for the purpose of constructing ditches for the conveyance and sale of water, makes a loan of money, does not, of itself, make such contract void, as an act exceeding its corporate powers. Such a contract may be necessary to enable it to attain the object for which it was created. For instance, it might be necessary for such a corporation to make advances in the nature of a loan, to enable a contractor to construct their works; or, it might be very necessary for such a corporation to procure an additional supply of water, and a loan of money to another water company, who may be engaged in construct-

ing ditches which will bring such additional supply, may be the direct and necessary means to attain that object. So, too, it might become necessary for a corporation engaged in a large enterprise—such as the construction of large canals, railroads, turnpike roads, and the like—to borrow money in large sums; and in order to obtain the money on favorable terms and at a low rate of interest, it might be necessary to borrow it upon long time, providing a sinking fund for its repayment, by setting apart a certain portion of the corporate revenues, to be loaned out on interest, suffering the principal and interest to accumulate to an amount sufficient to repay the borrowed money when due. Such is the usual mode of conducting the business of corporations of that character; and there can be no objection to it so long as the legitimate business of the corporation is not changed into that of a loan company. So long as the loans are a mere incident to the exercise of its legitimate powers, they are rightful and valid. So, numerous other cases of a like character might be suggested, where loans by a corporation might be very proper and necessary in conducting its business operations; and if all corporations are to be considered as absolutely prohibited, or not permitted to make any loan of money except in the few classes of corporations where it is expressly allowed by the statute, and all such contracts are to be held void, a result would be produced which certainly never was intended by the legislature, nor is it sustained by the rules of law.

A corporation had power to insure lives and grant annuities, and it was held that, as it must have funds to apply to those purposes, it might loan its money, and the loan by it would be presumed to have been made in the ordinary course of its business, and therefore valid, although it had no express power to loan money. The authority to loan money was upheld as an incident to the other powers conferred by the charter: *Farmers' L. & T. Co.* v. *Clowes*, 4 Edw. Ch. 575; 3 Comstock, 470; *Farmers' L. & T. Co.* v. *Perry*, 3 Sandf. Ch. 339.

So, too, an insurance company was incorporated without any special provision in relation to the mode of investing its capital, and it was held that it had the power to invest the whole or any part of its capital by way of loans on bond and

mortgage, and to reinvest it in the same way whenever it should become necessary or convenient to do so: *Mann* v. *Eckford*, 15 Wend. 512.

Where a bank was authorized to take mortgages in security for debts *previously* contracted, it was held that, if the loan and mortgage were concurrent acts, it was not a violation of the restraining clause of the statute: *Silver Lake Bank* v. *North*, 4 J. Ch. 370; *Baird* v. *The Bank of Washington*, 11 S. & R. 411.

A plank road company was not authorized to loan money, but if necessary, it can legally loan a sum of money to one of its contractors to enable him to build a portion of the road: *Madison, etc., Plank Road Co.* v. *Watertown Plank Road Co.*, 5 Wis. 173.

A corporation was prohibited from dealing in goods, wares and merchandise: *held*, that a loan made, secured by a quantity of cotton, which was to be shipped and sold and the proceeds credited to the debtor on the loan, was not a violation of the charter: *Bates* v. *State Bank*, 2 Ala. 465. So, too, a sale by a bank of a quantity of butter, which it had taken in settlement of a debt, was deemed no violation of a similar clause in its charter: *Sacketts Harbor Bank* v. *Lewis County Bank*, 11 Barb. 213. A glass company, not authorized to sell goods generally, sold goods to one in their service, and it was held that the legislature did not intend to prohibit a supply of goods to those employed in the manufactory, and that the corporation might recover for them: *Chester Glass Co.* v. *Dewey*, 16 Mass. 102. Numerous other cases might be quoted establishing the same principle.

Again, in numerous cases it has been held, that a contract made by a corporation which is not authorized by its charter is not to be held void, and that a defendant sued thereon can not refuse payment; but the legislature may inquire into any violation of the charter, or the government may institute suit for that purpose. The investigation must be in a direct proceeding instituted by the government for that purpose, and it can not be had in a collateral way by individuals: *The Grand Gulf Bank* v. *Archer*, 8 S. & M. 151, 173; *Wade* v. *American Colonization Society*, 7 Id. 663; *Bank of Port Gibson* v. *Nevitt*, 6 Id. 513; *Chester Glass Co.* v. *Dewey*, 16 Mass.

102; *Moss* v. *Rossie L. M. Co.*, 5 Hill, 140; *The Banks* v. *Poitiaux*, 3 Rand. 142, 146; *Vidal* v. *Girard's Executors*, 2 How., U. S. 191; *Fleckner* v. *U. S. Bank*, 8 Wheat. 355; *Natoma W. & M. Co.* v. *Clarkin*, 14 Cal. 552.

This objection to the right of the plaintiff to enforce this contract is therefore overruled.

The mortgage in this case is of a certain sluice or flume extending from Murphy's Flat to a point below, on Angel's Creek, near the suspension flume of Emory & Co., together with the water passing through the flume and the waters of Murphy's Flat and Angel's Creek, "and as well the said sluice and flume when completed, and all and every part thereof, and so much thereof as is now completed, and all rights, benefits, and privileges which may accrue to the said party of the first part upon the completion thereof." It was evidently the intention of the parties that the mortgage should cover and include the whole sluice and flume, as well that which was then completed as that portion then unfinished and which might thereafter be completed. The appellant, Traver, who is a subsequent mortgagee, contends that the mortgagor could only mortgage the part then completed, and that the decree of foreclosure is erroneous, as it includes the whole flume, which, since the date of the mortgage, has been completed, and that it should be limited to that portion only which was finished at the date of the mortgage. This objection to the decree is not valid. The mortgage includes, as we have shown, the uncompleted, as well as the completed portions of the flume, and is equally valid as against the former as the latter. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon: *Ferguson* v. *Miller*, 6 Cal. 402; *Soule* v. *Dawes*, 7 Id. 575; *Sands* v. *Pfeiffer*, 10 Id. 258.

The last objection is, that the decree does not make any provision for paying the overplus of the proceeds of the sale of the mortgaged property, if any there should be, to Traver, the subsequent mortgagee. This objection is well taken; but as this court has full power to modify the decree in this

respect, there is no necessity for reversing the judgment on that ground.

It is therefore ordered, adjudged, and decreed, that the judgment rendered by the District Court in this action be and the same is hereby amended by adding the following clause: "And the surplus money of the proceeds of said sale, if any there should be after paying the said indebtedness due the said plaintiff and said costs, shall be applied to the payment of the indebtedness due the said defendant, P. L. Traver, upon his mortgage upon said premises, and the remainder, if any, paid to the said Murphy's Flat Fluming Company."

And the judgment as thus amended is affirmed.

On petition for rehearing, the following opinion was delivered by CROCKER, J.,—NORTON, J., concurring:

Some corrections of our former opinion are necessary, and a more full statement of our views upon one point may be proper. In the former opinion it is stated, that in the absence of a direct agreement to pay the money specified in the mortgage the mortgagee can have no personal judgment against the mortgagor. That was a point not necessary to be determined in this case, and should have been omitted, as it was not fully discussed by the parties in their briefs. The question whether an action to foreclose a mortgage is barred when the debt it was given to secure is barred, should properly have been more fully explained.

In most cases, the debt secured by a mortgage is evidenced by a writing in some form, either by a covenant or agreement to pay it in the mortgage, or by some independent written contract, such as a note, bond, or agreement. In such cases the same clause in the statute of limitations, fixing four years as the period of time which will bar the demand, applies to both the debt and the mortgage, and thus expressions are found in some cases of that character, to the effect that the mortgage is barred by the same lapse of time as the debt, which is correct when applied to cases where the debt and the mortgage are both evidenced by writing. In the present case, however, it appears that the debt is not evidenced by a written contract, either in the mortgage, or by a separate

instrument. The statute of limitations does not operate as a payment or discharge of the debt, and the mortgagee still has the right to enforce any right of action arising out of the contract of the mortgagor, not barred by the statute of limitations. In this case his right to a personal judgment against the mortgagor is barred by the statute, the contract to pay the debt not being in writing, and the action not having been commenced within two years from the time the cause of action accrued. But the debt itself not being in fact paid or satisfied, and the contract, so far as it relates to the lien upon the property, being in writing, and not barred by the statute of limitations relating to written contracts, the mortgagee has a right to enforce the right of action against the mortgaged property, because the action, to that extent, is "upon a contract, obligation, and liability, founded upon an instrument of writing." This right of action is not therefore barred until the expiration of four years from the time the cause of action accrued, and the action in this case having been brought within the four years, it is not barred by the statute.

The rehearing is denied.

FEATHERSTONHAUGH v. LEE MOOR PORCELAIN CLAY COMPANY.

(Law Reports, 1 Equity, 318. Before the Vice Chancellor, 1865.)

[1] **Lease does not determine corporation.** The cessation of all operations for a certain time, or the letting of the entire corporate property to strangers for a definite period, is not necessarily an abandonment of the purposes of a mining company.

Power to transfer the entire corporate property. By the company deed large powers were conferred on the board of directors, and it was provided that in the case of any doubtful action, on their part, the same, if submitted to a shareholders' meeting and approved by a two thirds vote, should be binding upon every shareholder, whether under incapacity or not. After nine years unsuccessful operations, the directors were ordered by a two thirds vote of a shareholders' meeting, to lease the entire works for a period of twenty-one years. *Held*, that the lease was within the powers conferred, and was a proper method of endeavoring to make the most out of the assets of the company.

[1] *Croft* v. *Lumpkin M. Co.*, 61 Ga. 465.

This was a bill to set aside a lease of the buildings and works of the above-named company.

The plaintiffs were the executors of Walker Featherstonhaugh, who was the registered holder of 800 deferred shares in the company, which was originally registered under the 7 & 8 Vict. c. 110, and formed by a deed of settlement dated the 21st of February, 1852, of which the parts material to the present question were the following:

It was provided that the name of the company should be The Lee Moor Porcelain Clay Company, and that its business should, in the first instance, be "the working and preparation of porcelain clay and its adjuncts, or incidental products (not including the manufacture of bricks or tiles from such adjuncts or incidental products, which manufacture was not intended to form any part of the company's business), and the sale of such prepared clay and its adjuncts, or incidental products." The company might also, if the same should be thought expedient after the original business had become developed, combine "mining operations" with the original business, as secondary and subordinate thereto.

Clause 4 provided for the assignment to the company of two leases, one dated in September, 1834, from the Earl of Morley to John and William Phillips, for 99 years, of a right of mining in Lee Moor and Torracombe Wood and other lands in the parish of Shaugh, Devon, and the other in January, 1835, from the Earl of Morley to John and William Phillips for 99 years, of the Morley Clay Works, consisting of buildings and rights of working china, and other clay, in the same lands, subject to certain rents and royalties.

The capital of the company was to consist of £100,000, in 4,000 shares of 25*l.* each, with power to increase by additional capital, not exceeding 20,000*l.* Out of the original capital of 100,000*l.* 80,000*l.* was to represent the value of the existing leases, works, plant, machinery, and stock; and the remaining 20,000*l.* was to be raised by the issue of shares.

The 80,000*l.* was to be represented by 3,200 paid-up shares, of 25*l.* each; whereof 2,000 were to belong to John and William Phillips, 660 to the Earl of Morley, and 540 to the partners in the Naval Bank (who were mortgagees from the

Phillipses for 4,000*l.* in 1836, and a further charge of 3,000*l.* in 1841).

The remaining 20,000*l.* were to be represented by 800 shares of 25*l.* each, to be subscribed for. The 1,200 shares of the Earl of Morley and of the bank, and the 800 shares to be subscribed for, were to be entitled to a preferential dividend of 6*l.* per cent. in priority to any dividend upon the 2,000 shares of the two Phillipses; then such 2,000 deferred shares were to carry a dividend of 6*l.* per cent. and the residue of the profits were to be applicable to the payment of a further dividend in respect of all the shares.

Clause 21 provided, that at any time after the payment of a yearly dividend of 6*l.* per cent. it should be lawful for the company to extend its business to mining operations, "but so that the preparation and sale of procelain clay should always *bona fide* continue the main or principal business of the company."

Clause 30 was as follows:

"That it shall be competent for any extraordinary general meeting, by a majority which shall consist of at least two thirds in number of the whole number of votes recorded in relation to any of the matters provided for by this present clause, by any resolution or resolutions, to empower and require the directors, subject to such exceptions as hereinafter specified, and so far as the rules of law or equity will permit, to amend, add to, or repeal, all or any of the clauses, provisions, or stipulations herein contained, which may be in force for the time being; and also to make, do, or execute, and to bind the company and every shareholder thereof to any act, deed, matter or thing whatsoever, which the company by virtue of its corporate capacity or otherwise, or all the shareholders thereof together, is or would be enabled to make, do, or execute, if the consent of every shareholder were given thereto: provided always, that no general meeting, ordinary or extraordinary, shall have power so as to affect or alter the provisions of these presents respecting the mode of division of the profits of the company among the holders of shares in the original capital stock thereof as hereinbefore provided, or to affect or alter any arrangements which shall have been made upon the creation or issue of new shares under the power in

that behalf hereinbefore contained, in regard to the participation of the holders of such new shares in the profits of the company, or to affect or alter the provisions for the indemnity of the officers, or as to the dissolution of the company, or the prolongation of its duration, or for limiting the liability of the shareholders to the assets of the company."

Clause 33 provided, that every preferential share should confer a single vote, and every three deferred shares should be equivalent to a preferential share.

Clause 51 contained the following stipulation: "The board of directors shall have power to enter into, establish, and make all such contracts, agencies and arrangements of every description, in connection with the business of the company, as they, the said board of directors, shall deem expedient, subject, nevertheless, to the provisions of the said Act of Parliament and of these presents; and in case any contract or arrangement, which shall be in contemplation, shall be of a character materially affecting the rights and interests of the shareholders, so as to give rise to doubts whether it is within the competence of the directors to conclude the same, then, and in such case, whatever may be the nature of such contract and arrangement (so that the same be not in violation of the said Act of Parliament, or of the rights which are, by the 30th clause of these presents, specially protected against interference), the same may be submitted to an extraordinary general meeting of the company; and if sanctioned by such meeting, either in its original form, or subject to any modifications, such contract, or arrangement, in the form in which the same shall so have received the sanction of such general meeting, shall become, and be, absolutely binding upon the company, and upon every shareholder therein, whether under incapacity or not, in like manner as if every individual shareholder in the company were *sui juris*, and had consented to such contract or arrangement in the form in which the same shall so have been sanctioned."

On the 27th of March, 1852, the company was completely registered, and on the 4th of March, 1854, a dividend was declared of 6*l.* per cent. on the preferential shares, and three quarters per cent. on the deferred shares. No other dividend had since been declared.

William Phillips, who was the acting manager of the company, died in 1861, and shortly afterward his property at Lee Moor, including the brick works, and his interest in a surface lease and railway, with stock and plant, were purchased by the company for £7,897.7*s.*

In the same year, in accordance with certain resolutions, duly passed, the directors obtained loans to the amount of £10,000, and also created and issued 800 new £6 per cent. preference shares of £25 each, which were principally held by directors.

After William Phillips' death, the management was, for a time, continued by his son; but the directors, finding that the business was not conducted at a profit and that a large outlay would be necessary, owing to the erroneous construction of the works at the top of a hill, and the necessity of making new ones, in August, 1862, called a general meeting of shareholders, to consider the propriety of winding up the company. At this meeting, which was held on the 10th of June, 1862, out of a total of 3,464 votes, 2,735 were given; 2,536 for winding up, and 199 against, the minority being the votes of a single dissentient shareholder. One of the plaintiffs, as representing his father, attended this meeting, accompanied by his solicitor, and was heard against the proposal; but did not vote, having omitted to obtain a proxy paper.

On the 11th of September, a resolution was passed for winding up the company; but on the 14th, the question was adjourned on the statement of the directors that an arrangement had been entered into for letting the works on favorable terms; after which the directors immediately advertised terms on which they were prepared to lease the works.

On the 12th of December, Mr. Walker Featherstonhaugh sent a notice to the manager, protesting against the letting of the works, and on the 20th of February, 1863, his solicitor wrote threatening a bill for an injunction, to which letter he received an answer on the 27th of February, stating that the lease was executed.

On the same 20th of February, the solicitor also wrote to Mrs. Martin, the intended lessee, stating that he was advised the directors had no power to grant the lease, and that, on

behalf of Mr. Featherstonhaugh, he had given instructions to counsel to file a bill to restrain the granting of it.

The lease was dated the 12th of February, 1863, and made between two of the directors of the first part, three others of the second part, the company of the third part, and Rebecca Martin of the fourth part. It comprised all the property in which, according to the deed of settlement, the operations of the company were to be carried on. The term was for twenty-one years from the 25th of December, 1862, and the annual rents were 800*l.* for the first seven years, 1,000*l.* for the next seven years, and 1,200*l.* for the last seven years. There were also separate occupation rents, and rents in respect of rights of way and water, amounting together to 330*l.*, 10*s.*; and royalties were reversed on china clay and other minerals.

On the granting of the lease, the directors disposed of the whole of the plant, machinery, implements, and stock in trade of the company.

On the 26th of March, 1863, Mr. W. Featherstonhaugh died.

This bill was filed on the 7th of August following, against the company, certain of the directors, and Mrs. Martin, the lessee. She had, in fact, died about a month previously, and her three sons, who, as her personal representatives, became the owners of the lease, were made defendants by amendment, but not until April, 1864.

The bill charged that the lease "was inconsistent with the objects for which the company was formed, and that under the deed of settlement no general meeting, ordinary or extraordinary, could have power to authorize the directors to deal with the business of the company in a manner inconsistent with the objects of the company as defined by the deed of settlement."

The plaintiffs further stated that "from the terms of the lease it was utterly impossible that the deferred shareholders could receive any interest or dividend whatever upon their shares during the whole period for which the lease was granted, while their liabilities or the liability of their estates would continue, and the bed of clay which the company was formed to work might be consumed and must at any rate be much diminished."

The company and directors by their answer insisted that "from the general scope of the deed of settlement, it appeared that the object of the enterprise was to raise capital and establish an organization for the working of the clay beds comprised in the leases, by some person or persons on behalf or for the benefit of the company, and that it was not contemplated that the company, or the directors, should themselves engage in or superintend the working of the enterprise as raisers or manufacturers. Accordingly, wide powers were conferred by the deed of settlement on William Phillips, the lessee and manager of the works; and it was obviously contemplated that such or similar powers, vested in some person or persons other than the directors, would be needed so long as the company continued to exist."

The Messrs. Martin put in a voluntary answer, insisting on want of notice and acquiescence, and stating that after great outlay in reconstruction of the works, the business was now being worked advantageously.

OSBORNE, Q. C., and E. MACNAGHTEN, for plaintiffs.

WALEY and DRUSE (with them ROLT, Q. C.,) for the company.

J. M. GIFFARD and E. CHARLES, for the Messrs. Martin.

SIR W. PAGE WOOD, V. C.

It appears to me that I should be controlling improperly the effect of this deed, if I did not allow this company to do that act which through the medium of their directors they have done.

The whole case appears to turn on the 30th section, coupled with any observations that may arise upon the constitution of the company with reference to their preferential and other shares, as shown by the other clauses of the deed.

The question is whether, under the unusually large powers conferred upon a meeting of the shareholders by this deed (which are not by any means unreasonable powers), the company are not able to do that which they may deem best with reference to their own assets.

It was put very ably by Mr. Waley in the opening of the

case, that the company having taken certain powers with reference to amending, altering and varying the provisions in the deed, it might be conceded that all those powers tended to the altering, varying, or amending anything that might be requisite for the immediate carrying on of the business which was in hand, but that a crisis might come, in which it would be necessary to have powers larger than any which were contained in the deed. Something might have to be done with reference to the administration of the property of the concern, which would require a more effective control over the property of the company by the shareholders than could be given under any ordinary shareholders' deed, it being well known that, under an ordinary shareholders' deed, the only thing that can be done when difficulties arise is to make provision (if there is no power of sale contained in the deed) for the dissolution of the company and winding up of its affairs, in such manner as may be prescribed by the deed itself. There might arise, however, and it appears to me abundantly clear on the evidence that there did arise in this case such a state of things—that the company was placed in such a position with reference to its assets—that a dissolution was the necessary course, from the state at which the assets had arrived, unless, indeed, something else could be determined upon, or some other course could be taken in dealing with the assets. Mr. Waley put this pertinent question, whether any more natural interpretation of this clause could be conceived than to say that it was with reference to dealing with the assets in case of emergency that a power of such a decription as is contained in this deed was inserted. The power is in these words: [His Honor read the clause as set out above]. Then this emergency has arisen. It was considered by a large majority of shareholders—by everybody, in fact, except the plaintiff's testator—that a dissolution must take place. There were remonstrances by the testator, but everybody else came to that opinion; and, indeed, they passed a resolution at a meeting of the shareholders to that effect, that a dissolution should take place. That resolution had to be confirmed by a second general meeting. In the interval, and before the time for confirming it had arrived, a proposal came from some one more sanguine, apparently, than the shareholders of the

company, after their unfortunate experience up to that time, who said: "I am prepared to erect new works, your old ones being quite insufficient for all the purposes for which the company is constituted. I will work your assets for twenty-one years, and I will deliver up the works at the end of that time with better machinery than I find here, better arranged and better placed" (for the whole scheme was to put the machinery at the bottom of the hill instead of at the top, which appears to have been an absurd arrangement); "and that being done, you shall have your property handed back, at the end of twenty-one years, in an available position."

Surely such an emergency as that is one which might well be contemplated. It was not actually specified in the deed, but the company felt that an emergency might arise in which it might be difficult to deal with the assets in a manner most beneficial for all parties concerned, by reason of the incapacity of some and the unwillingness of others to consent, and therefore introduced this large power.

Now, of course, this power, although very large, would be controlled by the general scope, object, and purport of the deed. That is, in my opinion, the answer to Mr. Osborne's argument on the Act of Parliament, and the authorities. Mr. Osborne says that by the Act of Parliament the company must state to the legislature for what it is incorporated, and can not deviate from the purpose for which it is incorporated, and the object it has in view, without having a supplemental deed, to be properly executed, as pointed out by the Act of Parliament, and having that supplemental deed duly registered. He says, that upon the authorities, beginning with *Natusch* v. *Irving*, Gow on Partnership, 126, 257, downwards, the same state of law arises as upon the statute, namely, that persons having associated for one purpose, and having bound themselves to carry into effect that purpose, can not, without the consent of every individual proprietor, be held to have bound themselves to enter into an engagement, to carry out some totally different purpose. Now, although that class of decisions may not reach the whole of the case as contended for by Mr. Osborne, in this particular instance, where there is such a clause as the present, it is quite enough for the present purpose to say that I should hold those de-

cisions as still extending to the present clause, notwithstanding its largeness of power which provides that acts done by two thirds of the shareholders are to be just as binding as if every individual had consented. I should still, for the purpose of this decision, not find it necessary to hold that the clause proceeded to such a length as to justify a majority of two thirds in determining that the company could lawfully undertake, as if they had all consented, such a scheme as the working of a gold mine in South Australia, or any purpose utterly unconnected with any of the purposes of the deed. I do not think it necessary to extend the construction of the clause to such a case as that.

But I think there is a construction of the clause, perfectly consistent with the decided cases and with the Act of Parliament, which will authorize me so far to avail myself of the reasons and grounds of the decision of the House of Lords in the case of *Simpson* v. *The Westminster Hotel Company*, as to say that the test (at least for the purposes of this case) may well be—Have the company by this act which they intend to carry into effect by force of the clause, either, on the one hand, abandoned their purposes (these were the two cases put by Lord Campbell), or, on the other hand, exceeded their purposes? Have they done either one or the other?

It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property, instead of working it themselves, and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition at the end of the twenty-one years. They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. But, as to that view, I apprehend that it is perfectly competent for a meeting to say: "China clay is in a very depressed state—the market is very bad—and we agree it is better not to work it for two or three years." That would be entirely within their functions,

and they would not be said, in that respect, to have abandoned their work or to have exceeded the functions allowed them. Now I said I thought it would not be desirable to throw out any intimation that this clause would extend to give the company authorities wholly beside the deed, and that view will be fortified by one clause in the deed, which seems to indicate plainly that the company themselves conceived, when they were giving large powers to the directors, that those powers were only to be exercised in conformity with the general stipulations of the deed. I mean the 51st clause, with reference to contracts, the effect of which is, that the directors may enter into contracts of any kind, and for any purpose in carrying on the business, and provided (again following the same sort of form) it be not contrary to the Act of Parliament and the rules of law and equity, they are enabled to carry the contract into effect. But even there the company are jealous of conceding too large powers to the directors; and if any of the contracts shall appear to go beyond the exact limits of the authority of the directors; if there be any doubt in the minds of the directors—they are at liberty to submit the contract to a general meeting, and deal with it under the 40th clause.

Therefore, the 51st clause would—I do not say be restrictive of this, but it would in some degree—be explanatory and interpretative of what it meant, namely, "We do not mean to give you a wild random power to apply our money to any purpose you may think proper, so long as you can get two thirds of the shareholders to take that view; but we mean to have the largest control over the whole of the property of the company." That is the true construction of the clause. I read it in this way, that here is a considerable property in hand, and £120,000 about to be raised. Who can tell what may be all the incidents arising from working a speculative concern like this China Clay Company, by means of that capital? "In order, therefore, that neither the directors, nor ourselves, may be embarrassed by unforeseen incidents in the management of this property, we will take care to vest the power in two thirds of the shareholders of the company to say what, under any contingency, or in any emergency, is best to be done." I do not think I am thus putting a construction on

the instrument beyond the provisions of the Act of Parliament and the decided authorities.

That being so, I have only to look at the consequences that have arisen. Perhaps I am hardly justified in doing so, if I am right in my construction. It is for the company to judge what is best on an emergency; but with reference to what has been suggested to me as giving a clue to the interpretation of the clause as to the hardship upon the deferred shareholders, I think it necessary, first, to say a few words upon what the position of the company was.

Then I take Mr. Osborne's observation. He says independently of the observations arising on the general act and the decided cases, there is something special in the construction of this company, which renders it necessary for the court to hold its hand, with reference to a matter of this description, which, as part of its consequences, tends to give an undue advantage to the preference over the deferred shareholders. The scheme of the company is this—that the preference shareholders are to have £6 per cent., there being certain deferred shareholders who can take nothing until that £6 per cent. has been paid; and then, it so happening at the present time, that there is a majority of two thirds composed of the preference shareholders, it is possible, by such a construction as is asked by the defendants to be put on the deed, to leave the deferred shareholders entirely at the mercy of the preference shareholders, and enable them to defeat all the interests of the deferred shareholders. He says that is a necessary consequence, and therefore that the court has imposed upon it the duty of giving a more limited construction to the power given by the deed.

The first answer to that, I apprehend, would be, that the persons who entered into this engagement knew exactly the constitution of the company. Those who took deferred shares knew they had deferred shares, and those who took preference shares knew they had preference shares; and they entered into the deed with the clause before them, being willing to trust to two thirds of the shareholders, at a general meeting, all the authorities and powers here conferred. Hence the court would not be justified in saying that, because an act done may incidentally give a benefit to the preference at the expense of the de-

ferred shareholders, therefore, there is a fraudulent or improper exercise of the power; and I take it that the construction of this clause is not, in any way, altered by the circumstance on the face of the deed, that there are two distinct classes of shareholders.

If those, who knew that there were two distinct classes of shareholders have granted power to two thirds of the shareholders, be they who they may, it does not appear to me to be a legitimate argument to say that, because a certain act may result in an advantage to the one over the other, and those who are deferred may be defeated by those who have the preference, therefore the construction of the deed can not be such as I have considered it to be.

If that be so, there remains only the suggestion of fraud. Of course, there may be a fraud; the fullest power may be exercised fraudulently. As regards that part of the case, it is hardly put by the bill—it is only put by way of consequence—the consequence of your act may be so and so. That may be a very natural result, and yet may not indicate any impropriety in the act committed. In truth, it appears to me, if I may say so, that the shareholders have acted not only with perfect *bona fides*, but in a manner absolutely essential to the benefit of the shareholders in this respect.

The shareholders, whether preferential or deferred, have not received one sixpence for nine years. That was the state of the company when this arrangement was made. An absurd construction of the works had taken place; the works had been placed on the top of a hill, where they could be of no use; the company was largely in debt; they had borrowed £10,000 on mortgage; and the only resources they had were a sum of £2,000, which was not called up at that time, and the £6,000 or £7,000 which would come from the preferential shareholders, if they were disposed to advance it. Having to remove their whole machinery, which was disheartening enough; having failed, during nine years, to extract anything from their mines; being in such a condition, moreover, that the leases were held with a burden of £250 or £300 a year dead rent, with a condition as to working and the like, on a breach of which forfeiture might take place; having all this before them, they come to the conclusion that they must aban-

don the whole concern; and that conclusion (which is very important with regard to the *bona fides*) is come to before the lease was ever heard of, or thought about. They meet accordingly, and determine to dissolve. The testator, whom the plaintiffs represent, took a very sanguine view—that is to say, inasmuch as he had no more calls to pay on his shares, he wished the shareholders to embark a little more money in the concern, and see if they could not make something out of it. He was a shrewd man of business, and no one can make any complaint of his having taken that course. But they say, "We do not like that; we think it better not to go on; we think we should dissolve"; and they *bona fide* determined to dissolve. They advertised a second meeting to confirm the dissolution, the testator insisting they must go on with the works. Then they heard that somebody was willing to take a lease.

That brings me to the sort of case I suggested. Suppose they had found the china clay works unprofitable, through bad management, if you please—and that they could in no way make them profitable; and suppose—not the case that has actually occurred, of a lease that only gives a surplus rent to the preference shareholders—but that somebody had been found more adventurous still than Mrs. Martin, who would have offered to take a lease which would have given some fraction of profit to the deferred shareholders as well, and that, instead of paying £1,200 a year, she had agreed to pay £3,000 or £4,000. I don't suppose I should have heard any argument before me about the want of power. The question would have been rather, whether such a course of proceeding by directors would have been legitimate.

The lease is not for the whole term, but only for twenty-one years, leaving fifty years to come afterward; and here is a person who comes forward and says:

"I will take your discredited concern, which has not paid for nine years—a thing which nobody will take shares in—which is on the very verge of dissolution—upon which will ensue a total breakup, with large debts on a concern not likely to find a customer. I will indemnify you against all charges; relieve you from all burdens, give you a clear profit of some hundreds a year, and at the end of twenty-one years engage

to leave you the property in a much better condition than I find it." That is the proposition that is made; and I have to consider whether that is not truly and legitimately within the scope of a clause which says that two thirds of the meeting may determine with reference to this body anything whatever which the whole body of shareholders could determine.

If I had the whole body of shareholders *sui juris* (for that is the object of the clause), could I hold that I could restrain the whole body from entering into any arrangement for leasing their property, and disposing of it in the manner described?

I apprehend that, so far from that, if they had not been *sui juris*, the court would in such a case have been very glad to give them its assistance. As Mr. Waley put it, if the court were administering the assets in chambers, and the proposition were made with reference to administering such assets on the part of the testator, the court would be of opinion that it was a very proper and reasonable arrangement to make.

The strongest ground I have had to weigh is that the plaintiffs say: "If the assets were divided, there might be something coming to us." It is by no means clear to my mind that there would be a single sixpence coming to them. They, however, say: "By this arrangement, we are kept for twenty-one years in the same state as we have been for nine years before—we shall not have a farthing; and at the end of that time, in the general opinion of the shareholders, there may be some hope of making this mine, which has been in so unfortunate a condition, prosper."

But the fact that the deferred shareholders will be put into that position, I apprehend, amounts to nothing unless you can make out that there was a fraudulent intention.

I deal with Mr. Osborne's argument that, at the end of twenty-one years the same thing may be done, and then, at the end of another twenty-one years, the same thing may be done again; and so on—by observing that he is not to assert his rights like the dog in the manger, and say, "Nobody shall make any profit, because I can not make any."

If the slightest mixture of fraud could have been established in the motives of those concerned in this transaction, it

would have been a different matter. But here it is neither shown, nor even alleged. All the circumstances in the case, from the beginning to the end, appear to me to have been done *bona fide*, with a view of making the most of the assets of the company. That being my opinion, I hold, that making the most of the assets of the company was the very object of giving that large and general power contained in the clauses of the deed.

In that view of the case, it is unnecessary to enter into the question of *laches*. I think there is great complaint to be made of Mr. Featherstonhaugh and his representatives, as to the course they have taken; but I do not pursue that question further than the facts show, which are these—that this gentleman, protesting, as he called it, in December, knowing that there was the advertisement out for tenders; knowing that there was an intention of granting the lease; knowing that there was an agreement to confirm the lease, does not give the slightest intimation to the person who had tendered, until the lease had actually been sanctioned by the company, on the 17th of December, and had been actually executed by the company, on the 12th of February, and the intended lessee had been in possession, and doing something on the works ever since December. Then the bill is not filed in the testator's lifetime, although he lived until the 26th of March, and as he was well enough to be sending these notices, he must have been in as good a state of health as was necessary for the purpose of filing a bill. And when the bill is filed in the August following, the lady being dead, the plaintiffs are told that the representatives ought to be made parties; but they are not made parties till April.

That is not a very favorable case with which to come into equity, with reference to mining property.

I do not, however, decide the case upon that ground; my decision rests on the higher ground that what has been done was authorized to be done by that very large power conferred by the deed, and, therefore, I must dismiss the bill with costs.

PAXTON ET AL., Appellants, v. THE BACON MILL AND MINING Co., Respondents.

(2 Nevada, 257. Supreme Court, 1866.)

[1]**Corporation not held for debt of organizers.** When a corporation is formed composed partly of the members of a prior association and partly of the members of an older corporation, both parties contributing their property to the new organization, the new company is not liable for the old debts of either party among its organizers.

Idem. The stock of the members forming the old firm would be liable for their debts but the creditors could have no claim on the stock of the other party nor against the property of the firm.

Novation—Assumed contract. Where there is an agreement between the organizers of a corporation, that the corporation shall assume their debts, or if the corporation assumed, upon sufficient consideration, to pay the creditors of its composers, the action could be maintained against the corporation as an action upon its own contract.

Appeal from the District Court of the First Judicial District, Storey county, Hon. RICHARD RISING, presiding.

The facts are stated in the opinion.

WILLIAMS & BIXLER, for appellants.

L. ALDRICH and C. J. HILLYER, for respondents.

By the court, LEWIS, C. J.

Fairfax, Doake & Co., whilst proprietors of the Bacon mining ground, contracted the indebtedness upon which this action is founded, by over-drafts on the bank of the plaintiffs; the money thus obtained being used in the development and working of the mine. After this debt was contracted, Fairfax, Doake, and their copartners associated themselves with the proprietors of a certain quartz mill, and incorporated the property of both associations under the name of the Bacon Mill and Mining Company. By this arrangement the proprietors of the mill received an interest in the corporation equal to one fourth of its capital stock, and the owners of the mine received the remaining three fourths. Some time after the incorporation was perfected the plaintiffs presented their account against Fairfax, Doake & Co., to the secretary and some

[1] See *Table Mt. Co.* v. *Stranahan*, 20 Cal. 198; *Post* LOCATION.

of the trustees of the corporation for settlement; but though there was some talk of negotiating between two or three of the trustees and the plaintiffs with respect to the demand, there seems to have been no assumption of it by the defendant nor any promise to pay it. The only persons who in any way seemed to acknowledge the plaintiffs' claim were the members of the firm of Fairfax, Doake & Co., and the testimony of those persons clearly shows that they never intended to acknowledge it as a liability of the defendant, but only that they would endeavor to get the corporation to assume it and to make some arrangements for its payment. Mr. Fairfax, one of the firm of Fairfax, Doake & Co., with whom the plaintiffs had interviews about the payment of their demand after the incorporation, in speaking of the conversation between himself and the plaintiffs upon that subject, says: "I did not represent the defendant at any of these interviews or conversations, nor was I authorized to do so." And again he says: "All I have to say here is, that as owner in the ground I was always ready to make any fair adjustment of any claim of indebtedness contracted by Mr. Doake, but that as trustee of this company I have never undertaken or attempted to adjust this claim."

Mr. Pringle, who was also a member of the copartnership of Fairfax, Doake & Co., says, with respect to the conversations which he had with the plaintiffs: "I did not act or propose to act as a trustee, because there was no meeting of the board of trustees."

The board of trustees never seem to have in any way acted upon the matter, nor is it shown that there was any agreement between the proprietors of the mine and mill, at the time of incorporation, that the corporation should assume the liabilities or be responsible for the debts of Fairfax, Doake & Co. It is, however, claimed by counsel for appellant that such understanding or agreement was entirely unnecessary; that the liability of the defendant for those debts arises from the fact that it is the successor of the association which contracted the debt, and has received a transfer of all its property for the purpose of carrying out the object of the association of Fairfax, Doake & Co., and some authorities are cited to sustain this position,

none of which, however, in our opinion, in the remotest manner support it.

Had the mill owners all been members of the firm of Fairfax, Doake & Co. at the time the debt sued on was contracted, and had they formed a corporation for the purpose of carrying out the objects of the partnership or association, without taking in strangers, in such case the corporation would, perhaps, be primarily liable in equity for the debts of the association which it succeeded. Under such circumstances the property of no one but those who contracted the debt and were originally liable would be taken or subjected to the payment of it. The same persons continue the same business, with the same property, with no substantial change except in name. In such a case there is no reason why in equity the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association. But if the rule contended for by counsel for appellant be the law, the property of a stranger to the contract of indebtedness, who may have had no knowledge of its existence, or even the means of ascertaining it, would be subjected to the payment of the liabilities of individuals with whom he may have associated himself in a common enterprise or business. The injustice of such a rule is so apparent that no subtlety of reason can well disguise it. The general rule of law is that none are liable upon contract except those who are parties to it, but here it is sought to charge an entire stranger to the contract with the responsibility of discharging it. The plaintiffs had no lien upon the mine; the formation of the corporation deprived them of no remedy or security; the interest which the mill owners received in the corporation was doubtless only equal to the value of the property which they put into it; the plaintiffs' right of action against Fairfax, Doake & Co. continued as if no incorporation had taken place, and their interest in the Bacon Mill and Mining Company was as much subject to be taken to satisfy the demand of plaintiffs as the mining ground was before the incorporation; hence, we see no equity to favor the rule contended for by appellants' counsel. The case of an incoming partner is analogous to this, and it is universally held that he is not chargeable with the liabilities of the firm contracted before he became a member. If, instead of incorporating, the proprietors of the mill and Bacon mining ground had formed a partnership, the authorities are uniform

that, without a promise by the new firm, the mill proprietors would not be holden for the debts of the old firm: Story on Part., 152, 153.

Why, then, should they be any more liable when, instead of a partnership, they form a corporation? There would seem to be no better reason for subjecting the interest of corporations to the payment of the debts of their associates contracted before the formation of the corporation than for holding A liable for the payment of the debts of B, where there is no ground for doing so, except the purchase by A of the property of B.

If it be the law that a corporation is liable for the debts of some of its members contracted in the furtherance of the common object before they associate themselves with others in the corporation, why is it not also liable for the individual liabilities of each of its members contracted in the same pursuit? We apprehend it would be rather difficult to establish any substantial reason why the rule in the one case should not prevail in the other. The rule laid down in Angell & Ames on Corp., p. 169, that "if an association becomes incorporated, and the corporation accepts a transfer of all the property of the association for the purpose of carrying out the object of the association, the corporation will become primarily liable in equity for the debts of the association," certainly does not apply to cases where strangers to the association unite with it in the incorporation. The members of the original association, of course, continue liable, as if no incorporation had taken place, and their interest in the corporation may be sold on execution; but that the interest of a stranger to such indebtedness can be taken to satisfy it, is a doctrine which we can never sanction as law. Unquestionably if, when the mill proprietors and mining company were incorporated, there were any understanding or agreement between the respective parties that the corporation should be liable for the debts of the copartnership or association, this action could be maintained, because that would be a sufficient assumption of the debt to make it its own. Or if, after the incorporation was complete, the corporation assumed or promised upon sufficient consideration, to pay the creditors of any of its members, in such case also the action could be maintained. But when such promise is relied on it must be clearly

proven, for the presumption is against it. We conclude, therefore, that before the defendant can be held liable for the debts of Fairfax, Doake & Co., it will be absolutely necessary for the plaintiffs to show that such was the understanding between the parties at the time of incorporation, or to show such a promise as will be sufficient to bind it upon contract. Here, no such promise is shown. The conversations and promises of Pringle and Fairfax were not sufficient to charge the corporation with their liabilities.

The judgment of the court below must, therefore, be affirmed.

BROSNAN, J., did not participate in this decision.

GASHWILER ET AL. v. WILLIS ET AL.

(33 California, 11. Supreme Court, 1867.)

[1] **Deed by trustees—Evidence.** A deed executed by the trustees of a corporation with their private seals attached, but without any corporate seal, is not the deed of the corporation, even though it purports to be executed on behalf of the company; and such a deed will not be admitted in evidence unless the trustees first show their authority to execute it.

[2] **Sale of corporate property—Power of trustees.** The trustees of a corporation can only exercise corporate powers when duly assembled and acting as a board, and the sale of corporate property requires the exercise of corporate power.

No power in stockholders to authorize sale. The stockholders of a corporation have no power either as individuals or when assembled at a stockholders' meeting, to authorize the sale of corporate property; nobody can convey it unless authorized by the board of trustees when acting as such.

Appeal from the District Court, Fifth Judicial District, Tuolumne County.

The defendants were the stockholders of the corporation. The plaintiffs averred in their complaint that on or about the 23d day of September, 1865, they entered into negotiations with the corporation and with the stockholders for the pur-

[1] *Richardson* v. *Scott River Co.*, 22 Cal. 150.
[2] *Hillyer* v. *Overman Co.*, 3 M. R. 44.

chase of a gold bearing quartz mine in Tuolumne county, known as the Rawhide Ranch Gold and Silver Mining Company's Claim, and that the defendants represented that they had full power to sell the same, subject only to a trust deed executed by the corporation to Danford N. Barney, of the city of New York, in June, 1865, by which said Barney was authorized at any time between the first day of May and the first day of October, 1865, to sell the mine, according to certain written instructions referred to in the trust deed.

The plaintiffs further averred that the written instructions were not set forth in or attached to the trust deed, but that the defendants represented that by the instructions said Barney was required to sell the mine for the sum of fifty thousand dollars, to be paid to and received by the corporation and defendants in California before said first day of October, 1865, and in case payment was not made by that time the trust deed was to become null and void.

The complaint further averred that on the second day of October, 1865, the defendants represented that the sum of fifty thousand dollars had not been paid, and that they then had power to sell the mine, and that the plaintiffs on said last mentioned day bought the mine, and paid therefor the sum of twenty-five thousand dollars, took possession thereof, and expended money in erecting machinery on and improving it. That soon after doing so, plaintiffs discovered that the representations with regard to the written instructions requiring the fifty thousand dollars to be paid in California on or before the first day of October, 1865, were false, and that the instructions only required the money to be paid to said Barney in New York on or before said last named day, and that on the 27th day of September, 1865, said Barney had sold the mine to other parties in New York, and received the sum of fifty thousand dollars therefor, and that the plaintiffs, to avoid litigation, had been compelled, on the payment to them of the sum of fifty thousand dollars received by Barney, to convey and had conveyed the mine to the grantees of Barney. Plaintiffs averred that they had sustained twenty-five thousand dollars damages by the false representations of defendants and asked judgment for that amount.

On the trial as a part of their case, the plaintiffs offered in

evidence the trust deed to Barney. The plaintiffs were nonsuited and appealed.

The other facts are stated in the opinion of the court.

H. P. BARBER and JAMES H. HARDY, for appellants.

JOHN B. HALL and CALEB DORSEY, for respondents.

By the court, SAWYER, J.

The Rawhide Ranch Gold and Silver Mining Company is a corporation duly organized under the statutes of California, for the purpose of carrying on the business of mining. On the 29th of April, 1865, a special meeting of the stockholders of the corporation was held, pursuant to notice, at the office of the company, at which all the stockholders were present. At this meeting of the stockholders, all the stockholders being present and all the capital stock represented, a resolution was unanimously adopted authorizing S. S. Turner, T. N. Willis and James J. Hodges, trustees of said corporation for and on behalf of said corporation, to sell and convey to D. W. Barney the mine, mill, buildings, mining implements, and appurtenances belonging to said company. In pursuance of said resolution, and without any other authority shown, on the 5th of June following a conveyance was executed by said Turner, Willis, and Hodges, trustees, the commencement and form of execution of which are as follows:

"This indenture made the 5th day of June, A. D. 1865, between the Rawhide Ranch Gold and Silver Mining Company, a corporation under the laws of the State of California, by S. S. Turner, T. N. Willis and James J. Hodges, trustees of said corporation, who are duly authorized and empowered by resolution and order of said corporation to sell and convey," etc.

"In witness whereof, we, as the trustees of and for and on behalf of said corporation, have hereunto set our hands and seal (the said corporation having no seal) the day and year first above written.

"T. N. WILLIS. [L. S.]
"JAMES J. HODGES. [L. S.]
"S. S. TURNER. [L. S.]

"Trustees of the Rawhide Ranch Gold and Silver Mining Company."

On the trial, after proving the adoption of the resolution before referred to, at a meeting of the stockholders, as stated, the plaintiffs offered said deed in evidence, and defendants objected to its introduction on the three grounds—that it did not appear to be the act or deed of the corporation; that it had not the signature of the corporation, and that it was not sealed with the corporate seal but with the individual seals of the trustees. The court sustained the objection, and excluded the deed, to which ruling plaintiffs excepted; and this ruling presents the question to be determined.

Under the view we take, it will only be necessary to consider the first ground of the objection, and the question is, does the instrument in question appear to be the act or deed of the corporation? If not, it was properly excluded, and the judgment must be affirmed. It is claimed by respondents that no authority is shown in the parties executing to execute the deed on behalf of the corporation. If the deed of a natural person, purporting to have been executed by an attorney in fact, were offered in evidence, it would, clearly, be inadmissible, without first showing the authority of the attorney. The recital of the authority in the deed itself would furnish no evidence whatever of its existence. The same is true of an artificial person—a corporation—at least, where the corporate seal is not affixed. Whether the rule would be different when the regularly adopted corporate seal is shown by competent proof to be affixed, it is not necessary now to inquire; for it affirmatively appears in this instance that the corporation has no seal, and that the parties executing the instrument used their respective private seals, no express authority to adopt such seals being shown. It may also be admitted for the purpose of this decision, that it is competent for the corporation to adopt the private seal of the several trustees, or any one of them, as its seal *pro hac vice*, and that the conferring upon the agent power to execute the deed necessarily includes the power to adopt a seal on behalf of the corporation for the occasion. Still, as a seal regularly adopted by the corporation was not in fact used, it is necessary to show authority in the agent to execute the deed, in order to show,

by implication, authority in him to adopt a seal for the occasion. The authority of the trustees to execute the instrument in question must, therefore, affirmatively appear, or it does not appear to be the act or deed of the corporation.

We are not aware of anything in the law, independent of any authority expressly conferred by the corporation, which authorizes Turner, Willis and Hodges, in their official character as trustees, to execute the instrument in question on behalf of the corporation. No law of the kind has been called to our attention, and we do not understand that any is claimed by appellants' counsel to exist. And there is nothing in the nature of those offices, as connected with the object and business of the company, from which a general power in the trustees, when not acting as a board, to sell and convey the mine, mill and other property of the company, could be implied: *McCullough* v. *Moss*, 5 Den. 575. The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the board of trustees, or at any meeting of said board. The board of trustees do not appear to have ever acted at all upon the matter in the character of a board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

Section five of the Act, authorizing the formation of corporations for mining purposes provides: "That the corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders," etc. And section seven provides that: "A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons, duly assembled as a board, shall be valid as a corporate act": Laws 1853, p. 88, Sec. 5; 7 Hittel's Gen. Laws, Arts. 936, 938. Conferring authority to sell and convey the corporate

property is the exercise of a corporate power, and under these provisions the "corporate powers of the corporation" are to be exercised by the board of trustees when the majority are "duly assembled as a board." When thus assembled and acting the decision of the majority "shall be valid as a corporate act." We find nothing in the act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not, in their individual capacities, owners of the property as tenants in common, joint tenants, copartners or otherwise: *Gorham* v. *Gilson*, 28 Cal. 484; *Mickles* v. *Rochester City Bank*, 11 Paige, 128. This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them: *Wheelock* v. *Moulton et al.*, 15 Vt. 521; and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act—could only speak—through the medium prescribed by law, and that is its board of trustees. As well might the citizens of San Francisco, in public meeting assembled, by unanimous resolution authorize certain supervisors, designated by name, to sell and convey the city hall. It is said, however, that the trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a board of trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco, in public meeting assembled, at which the supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the

mode in which the corporation is authorized by the law of it's creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board. This is the mode prescribed. As a board they could perform valid corporate acts, and confer authority within the province of their powers, upon the trustees individually or upon any other parties to perform acts as the agents of the corporation. We are not without authorities upon this precise point.

In *Conro* v. *Port Henry Iron Company*, 12 Barb. 27, the same question arose. A lease of the company's iron works was made, in pursuance of a resolution adopted at a meeting of the stockholders at which the directors were present. It was held that the resolution imparted no authority to make the lease. The court say: "The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the directors, who are the body appointed by the charter for the management of its affairs. It is no answer that the individual stockholders, who were present at the meeting when the lease was ordered, were also directors. They did not meet as directors, but as stockholders. The mayor and common council of a municipal corporation can only act in the manner prescribed by law. When not acting in their official character and in the mode prescribed by law, their acts are no more binding than those of other private citizens: See, per Lord Mansfield, *Rex* v. *Head*, 4 Burr. 2,515, 2,521." Ib. 63.

McCullough v. *Moss*, 5 Den. 567, was an action upon a note purporting to have been executed by the Rossie Lead Mining Company. It was executed in pursuance of a resolution adopted by the stockholders. The statute of New York, conferring the power to manage the affairs of the corporation upon a board of directors, it will be seen, was similar to ours.

Lott, senator, in the court for the correction of errors, said: "The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate

act: 1 R. S. 600, Sec. 6. The authority of the board to the president and secretary was therefore necessary to give validity to the note. This was not shown. The resolution passed at the meeting of the stockholders, contained in the letter of the secretary, dated October 6, 1839, could not bind the corporation, especially so as to affect the members not present. When a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment: Ang. & Ames on Corp. 121–123, 151–164. The stockholders, as such, in their collective capacity, could do no corporate act. The directors were their representatives, and alone authorized to act. It is one of the fundamental conditions of the contract into which the corporators have entered by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation, and from this no essential departure can be made": Ib. 575.

The same doctrine is held in *Cammeyer* v. *United German Lutheran Churches*, 2 Sandf. Ch. 208, 221, 228–9. The Vice Chancellor says: "The fact that a majority of the trustees were present, acting as a council, does not make the resolutions of the council the act of the board of trustees. Suppose, in the case of a bank, that at a general meeting of the stockholders certain resolutions should be adopted to sell land or do any other corporate act, and it should be made to appear that all the directors of the bank were present and assenting to what was done, the corporation could not be bound unless the directors, at a meeting of the board, should concur in the resolutions. The directors in the bank and the trustees in this case are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class in which

they are but a component part, be a valid corporate act. In thus acting they would not be distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon the trustees which, in their proper board, would be unheeded; and no one can say with certainty that their vote in the latter event would have been the same. It was held in the *Case of the Corporations*, 2 Coke, 476, by Fraser, that where the power to make a by-law was in the mayor and aldermen, a by-law made by the mayor, aldermen and commonalty was void: Id. 229.

So also in *State* v. *Ancker*, 2 Rich. 245, the action of a board illegally assembled was held to be without authority. The court say: "Without being summoned together, the board, as individuals, have no official authority, nor have they any original authority at all, either under the charter or the by-laws": Ib. 281, 283. The charter granted by Elizabeth to the borough of Helleston conferred the power of making by-laws on the mayor and aldermen, and the power of electing burgesses on the mayor, aldermen and commonalty. A by-law was made by the mayor, aldermen, and commonalty—the entire body. Its validity was in question in *Rex* v. *Head*, and it was held void on two grounds. One was, in the language of Lord Mansfield: "The body at large had no power to make by-laws, because the power is, by the charter, given to the common council, consisting of the mayor and aldermen": 4 Burr. 2,521. Yet the mayor and aldermen acted in connection with the commonalty. These cases are in point, and none to the contrary have been called to our attention. They are the necessary consequence of the principles established by the great body of the authorities, that the corporate powers of corporations can only be exercised in the mode and through the instrumentalities prescribed by their charters. In this case, the resolution adopted by the stockholders was not a corporate act, and it conferred on the three trustees named —whether they constituted the whole number of trustees does not appear—no authority to perform a corporate act, to

execute the deed, or adopt a seal for the occasion. It not only does not appear, then, that the instrument in question is the act or deed of the corporation, but it affirmatively appears that it was executed in pursuance of a resolution that conferred no authority whatever to perform a corporate act; for the plaintiffs themselves introduced in evidence the authority under which they claimed the act to have been performed, and upon which they relied. Having done this, we are not at liberty to indulge the presumption that the parties executing the deed on behalf of the corporation were otherwise duly authorized. The authority acted upon is affirmatively shown, and this fails. We think the deed properly excluded. But even if it had been admitted without further proof of the authority of the parties to execute it, it would not have availed the plaintiffs. As there does not appear to have been any authority in the parties assuming to act, to sell or convey at all, it is unnecessary to discuss the other questions.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

By the court, SAWYER, J., on petition for rehearing:

The consequences assumed as the only basis of the argument in the petition for rehearing do not follow from anything determined or in any way suggested in the opinion in this case. We have nowhere held, or even intimated, that the board of trustees of a corporation can convey all the property of the corporation necessary to enable it to carry on the business for which it was organized, or do anything else destructive of the objects of its creation without the consent of its stockholders. We have not even held that it was competent for the trustees acting as a board, to authorize the conveyance of the property now in question without the consent of the stockholders. There was no such question in the case. We simply held that the stockholders themselves could not authorize the trustees, acting as individual trustees, or anybody else, to convey it—that nobody could convey it unless authorized by some act of the board of trustees, acting as a

board. It may be conceded for the purposes of this case that the board of trustees itself could not authorize a conveyance of the property in question without the consent of the stockholders. But it is unnecessary to consider that question, for the case does not present or even suggest it. It will be time enough to decide that question when it arises.

Rehearing denied.

THE STATE EX REL. FLAGG v. THE BOARD OF TRUSTEES OF THE LADY BRYAN MINING CO.

(4 Nevada, 400. Supreme Court, 1868.)

Term of trustees under Nevada statute—Time of election. The act of March 10, 1865, for the formation of corporations in Nevada, limits the term of trustees named in the articles of incorporation to six months from the date of incorporation, and though the time for holding the election of the next board should be fixed in a by-law, yet such time should accord with the statute, and any discretion exercised by the trustees in the matter should be reasonable and the time fixed at the expiration of the six months or as soon thereafter as practicable.

Mandamus compelling an election. The omission to adopt such a by-law is no excuse for a failure to call the election, and the neglect for two months after the expiration of the first six months to call the election, is a clear neglect of duty, the performance of which may be compelled by mandamus.

Neglect of one duty no excuse for neglect of another. Where a board are bound to fix by by-law the time for holding an election, the neglect to pass the by-law is no excuse for failing to hold the election, and no reason to defeat a mandamus to compel such election.

Where an election is commanded by mandamus, all preliminary matters incident to such election are by implication commanded by the writ to be done.

Petition for mandamus construed. A petition for mandamus is to be governed by the rules controlling the pleadings in an ordinary action, and in this case *held* not so defective as to warrant the refusal of the writ.

Expulsion of trustees no excuse for failure to elect board. The stockholders voted to expel the old board of trustees and elected a new board. *Held*, that such fact was no answer to the petition for mandamus, because if such action was illegal it was void and of no effect; and if valid it did not obviate the necessity of an election. Where all the members of a board have been evicted, the board continues its existence; its individuals only are changed, and such change can not affect the right to the writ.

The State of Nevada upon the relation of H. H. Flagg applied to the Supreme Court for a writ of mandamus against the Board of Trustees of the Lady Bryan Mining Company, to compel them to call an election of trustees under the statute. The notice of motion was addressed both to the "board of trustees, etc.," and to the trustees named in the opinion individually.

C. J. LANSING and WILLIAMS and BIXLER, for relator.

MESICK & SEELY, for respondents.

By the court, LEWIS, C. J.

Upon the proper statutory notice regularly served, the relator petitions this court for a peremptory writ of mandamus, commanding the defendants, who are the trustees of the Lady Bryan Company, to call and make provision for a meeting of the stockholders of the corporation for the purpose of electing their successors.

The facts upon which the writ is claimed are those substantially stated in the petition. The Lady Bryan Mining Company is a corporation organized on the third day of February, A. D. 1868, in accordance with the laws of the State of Nevada, for the purpose of mining for gold and silver in the county of Storey. The certificate of its incorporation declares that its capital stock shall be $1,800,000, divided into six thousand shares of the par value of $300; that the corporation shall exist for the period of fifty years; that the number of trustees to manage its affairs shall be five, three of whom were named in the certificate. It is further alleged that the relator is a stockholder in this corporation, owning upwards of one hundred shares of its capital stock; that John Rule, William T. O'Neale, A. W. Baldwin, George T. Gillis, and R. M. Daggett are acting or assuming to act, as its board of trustees, and that they are the only persons who are assuming or claiming to act in that capacity. The relator then states that "he is advised by his counsel, and believes the same to be true, that under the requirements of the law of the State, the first annual meeting for the election of a board of trustees of said company to manage its concerns for

the first year then next ensuing, should have been held on the third day of August, A. D. 1868, but he says no such meeting was called or held." It is also charged that the trustees, having so failed to call a meeting of the stockholders, the petitioner served a paper, which was addressed to the "acting president, secretary and board of trustees of the Lady Bryan Mining Co.," upon each member of the board, in which he requested them to make provision for and call such meeting at the earliest practicable day. But, it is alleged, "notwithstanding the demand contained in said notice, the said acting board of trustees have refused to call a stockholders' meeting as therein requested, or any other meeting of stockholders for the purpose of electing trustees for the said corporation, and do still so refuse."

It is argued for the relator that by the incorporation law of this State, the first election of trustees under this organization should have been held on or about the third day of August, A. D. 1868, six months after the time the certificate of incorporation was filed. This claim is predicated upon the language of section two of an act to provide for the formation of corporations for certain purposes: Stat. 1865, 359, which declares that the certificate of incorporation shall state the names and number of trustees, who shall manage the concerns of the company for the first six months. The certificate whereby this corporation was incorporated being filed in the proper office on the third day of February, it is argued that the trustees named therein could hold their office only for six months, and so that a meeting should have been called for the election of their successors on or about the third day of August. This section clearly limits the term of the trustees selected and named in the certificate of incorporation to six months from the time of incorporation, and clearly at the expiration of that time an election should have been held. But section five of the act already referred to declares that the "annual election shall be held at such time and place within the State, and upon such notice and in such manner as shall be directed by the by-laws of the company." This language, it is urged for defendants, leaves the time of holding such elections to be determined by the board of trustees, who have the right to designate it by the adoption of a by-law.

The law itself, it is argued, does not fix the time, and as it is not alleged in the petition that a time has been fixed by by-law, it is not shown that the board of trustees have neglected any duty; and as this writ will only issue to compel the performance of an act which the law especially enjoins as a "duty resulting from an office, trust or station," counsel conclude that the petition is defective in not alleging the fact that a day had been fixed by by-law for holding the election, and upon that ground a demurrer is interposed to it. It is true that the time of holding the elections should be designated in a by-law; but the time fixed in that way must accord with the letter and spirit of the act of the legislature, and the second section of that act unmistakably limits the term of the trustees first selected to six months. That time expired in this case on the third day of August, hence at that time the election should have been held. As it is made the duty of the trustees, by section four, to adopt all necessary by-laws they should have designated that day, or the earliest practicable day thereafter, as the time for holding the election for their successors.

We do not think the language of section 5 leaves the time of holding the elections absolutely in the discretion of the trustees as claimed by the learned counsel for the defendants. So far as the first election is concerned, it certainly does not. The time when that is to be held is fixed in the law itself, at a period six months after the filing of the certificate of incorporation. This time is unequivocally specified, and we see nothing in the context of the law to induce the belief that the legislature did not intend precisely what it expressed. But the period of six months might expire on the Sabbath or some holiday upon which the election could not well be held—hence it becomes necessary to designate some day, and the time of the day when it shall be held. That, the trustees have the right to do by by-law, and this is the extent of the authority given them in section 5. It is necessary that so far they should be allowed to exercise their own discretion; beyond that they are controlled by the law itself. The act of the legislature does not require an election to be held at any time not practicable, but when it limits the term of the first trustees to six months, the time of the election

should be set at as early a day as practicable after the expiration of that time. The law does not demand that which is impossible, but it exacts good faith and fair dealing. It was the duty, then, of the trustees to call an election upon the third day of August, or as soon thereafter as practicable. It is, however, charged in the petition that, at the time of its filing, which was on the twenty-fourth day of September, none had been called, and it is alleged that the trustees still refused to make such call. This, it seems to us, makes out a case for the relator. The failure for a period of nearly two months after the time designated in that law to call and provide for an election, is at least a *prima facie* showing of neglect and failure on the part of the trustees to perform their duty. Whether they had adopted a by-law regulating that matter or not, is of no consequence so far as this question is concerned; for if they had failed for this length of time to call the election, it shows either that the by-law is unreasonable and not in accordance with the provision of the legislative act, which required an election about the third day of August, or that the by-law itself had been disregarded. In either case a mandamus should issue to compel an election at the earliest practicable day. Or if no by-law had been adopted fixing a day of election, and that fact were alleged in the petition, still the failure to call such election would be no less a neglect of duty on the part of the trustees, for it is their duty to adopt such by-law, and they can not avail themselves of the failure to do it as a reason why they should not do another act which the law imposes upon them as a duty. If the petition contained such allegation it would simply show a double neglect of duty—that is, a failure to call an election and also to adopt a by-law, an act which should properly have preceded the same. But such by-law may be adopted at any time. The want of it is therefore no reason why the writ should not issue commanding the trustees to call an election. Indeed the by-law is simply the prescription of the time, place, and manner in which the election shall be held, while the ultimate object to be attained is the election itself. A writ, therefore, commanding the trustees to call an election, accomplishes all that is necessary, as the law itself directs the manner in which the call shall be made—that is,

by the adoption of a by-law designating the day, place, and manner. And the command to call an election necessarily includes the order to do it in the manner provided by law. This is somewhat analogous to a case where the writ is issued to a judicial tribunal, commanding it to proceed with the trial of a cause, although it may be indispensably necessary to perform many acts preliminary to the trial, and without which no trial can be had, such as the opening of court, or the issuing of a venire for a jury, and the like. Still these are matters which are never considered, but the writ issues commanding the court to proceed with the trial, and the law directs the manner in which it shall be conducted. Hence we conclude that the failure to allege the existence of a by-law does not render the petition defective.

It is also suggested that the petition does not show that an election has not already been had. We think otherwise. It is first alleged that the first annual meeting should have been held on the third day of August; that no such meeting was called or held; that in consequence of the failure of the trustees to call it, the relator requested the board in writing to call such meeting at as early a day as practicable; that notwithstanding such request this board have refused to call a meeting, as requested, or any other meeting of the stockholders for the purpose of electing trustees, and do still so refuse. Such is the substance of the allegations upon this point. Doubtless they might have been more explicit, but we think the fact that no annual election had been held at the time the petition was filed is sufficiently shown under the liberal rules of our practice act, section 70 of which declares that "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." And it is conceded that the petition in a proceeding of this kind is to be governed by the rules controlling the pleadings in an ordinary action. If, then, we give its averments this liberal construction, it can scarcely be claimed that it does not show that the annual election, which should have been held on or about the third of August, has not been held. Although not fully explicit upon this point, we do not think the petition so defective as to warrant a refusal

of the writ upon that ground, at least after the defendants have answered over, and thereby waived, all defects in the manner of stating a fact.

The only remaining point presented for consideration is raised by an allegation in the answer to this effect, that on the fifth day of October (which was some time after the institution of this proceeding) the relator and other stockholders of the Lady Bryan Company assembled at the office of the said company, and as such stockholders proceeded to and did vote to expel and remove the old trustees, Rule, O'Neale, Baldwin, Gillis and Daggett, from office, and elected for their successors the relator and four others, to act as trustees of the company. The defendants, however, deny the right of the stockholders to proceed in such manner, and do not admit the legality of the proceeding, or that it is binding upon them. But this proceeding, in our opinion, constitutes no objection to the issuance of the writ in this case, for two reasons. First: Because the defendants themselves claim that the action of the stockholders removing them was illegal, and hence that they are still the legal board. Such being the case, the allegation of the answer only shows that the stockholders did an act which effected nothing, being entirely nugatory and void. We do not think that the defendants ought to be allowed to avail themselves of this proceeding by the stockholders as a defense while they deny its legality, and claim, notwithstanding, to be the legal trustees. Second: Even admitting the removal to be valid, still that does not obviate the necessity for an election. This action of the stockholders is a special proceeding, which is authorized under certain circumstances by section 5 of the incorporation law of this State, which declares that "it shall be competent at any time for two thirds of the stockholders of any corporation, organized under this act, to expel any trustee from office and to elect another to succeed him." Although under the authority of this provision all the members of a board be expelled from office, still that should not interfere with the annual election. If any one or all of the trustees be expelled in accordance with this section only a day preceding the annual election, the election must still be held. If the expulsion be valid, the individuals only are changed,

the board continues, and the answer in this case does not show that there is not the same necessity for issuing the writ to the new board as to the old, and without such showing we are unable to see how any change of the individuals composing the board can affect the relator's right in this proceeding.

Entertaining these views of this question it is unnecessary to decide whether the expulsion of the old trustees was a legal proceeding or not. The defendants deny its legality, and so render that fact unavailing as a matter of defense to themselves in this proceeding; for if it were illegal and void they still constitute the legal board of trustees, and to them the writ should issue.

The mandamus must issue commanding the board forthwith to give notice of an election to be held upon some day within two weeks from the time the writ is issued.

WHITMAN, J., did not participate in the foregoing decision.

THE SOUTH OF IRELAND COLLIERY CO. v. WADDLE.

(Law Reports, 4 Common Pleas, 617. Exchequer Chamber, 1869.)

Corporation may contract, without seal. Trading corporations may bind themselves by contract without the use of the corporate seal. The old rule as to corporations contracting only by corporate seal no longer exists as to trading companies.

Appeal from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant or a nonsuit, on the ground that the contract declared on did not require a seal: Law Rep. 3. C. P., 463.

MAURICE POWELL (W. H. CLAY with him), for the defendant, contended that the plaintiffs, being a corporation, could only contract under their common seal, unless in regard to matters of trivial amount and of every-day occurrence. He cited *East London Waterworks* v. *Bailey*, 4 Bing. 283 (E. C. L. R. Vol. 13); *Copper Miners Company* v. *Fox*, 16 Q. B. 229 (E. C. L. R. Vol. 71; 20 L. J. Q. B. 174; *Lamprell* v. *Bille-*

ricay Union, 3 Ex. 283, 18 L. J. Ex. 282; *Diggle* v. *London and Blackwall Railway Company*, 5 Ex. 442, 19 L. J. Ex. 308; *Homersham* v. *Wolverhampton Waterworks Company*, 6 Ex. 137, 20 L. J. Ex. 193; *London Dock Company* v. *Sinnott*, 8 E. & B. 347, E. C. L. R. Vol. 92, 27 L. J. Q. B. 129; *Finlay* v. *Bristol and Exeter Railway Company*, 7 Ex. 409, 21 L. J. Ex. 117; *Smart* v. *West Ham Union*, 10 Ex. 867, 24 L. J. Ex. 201. And he sought to distinguish the following cases, on the ground that they fell within the exception as to matters of daily necessity: *Beverley* v. *Lincoln Gas Light Company*, 6 Ad. & E. 829 (E. C. L. R. Vol. 33); *Clarke* v. *Cuckfield Union*, 1 Bail C. C. 85, 21 L. J. Q. B. 349; *Church* v. *Imperial Gas Light Company*, 6 Ad. & E. 846; *Australian Royal Mail Steam Navigation Company* v. *Marzetti*, 11 Ex. 228, 24 L. J. Ex. 273; *Nicholson* v. *Bradfield Union*, Law Rep. 1 Q. B. 620.

HUDDLESTON, Q. C. (PHILBRICK with him), for the plaintiffs, was not called upon.

COCKBURN, C. J.

We are asked to overrule a long series of decisions in all the courts, which, in accordance with sound sense, have held that the old rule as to corporations contracting only under seal does not apply to corporations or companies constituted for the purpose of trading, and we are invited to reintroduce a relic of barbarous antiquity. We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of BOVILL, C. J., which seems to us to exhaust the subject. In early times, no doubt, corporations could only, subject to the well known exceptions, bind themselves by contracts under seal. And for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases, and may now be considered settled law. The machinery contracted for in this case was clearly necessary for the purpose for which the company was formed, viz., the working of coal mines.

KELLEY, C. B., CHANNELL, B., LUSH and HAYES, JJ., and CLEASBY, B., concurred.

Judgment affirmed.

FIELD ET AL. v. PIERCE.

(102 Massachusetts, 253. Supreme Court, 1869.)

Fraudulent organization of corporation—Paying up stock by the form of delivering checks which are never presented. In consideration of the transfer of mining property by F. & S. (the plaintiffs) to P. (the defendant), the latter agreed to organize a mining corporation and give F. & S. a tenth of the corporate stock; and thereupon the parties with others signed articles of association, which articles fixed the amount of the capital stock, divided into shares of equal par value, and specified the portion of the total number of shares to be assigned to each associate, and one tenth of them as belonging to F. & S. This corporation voted to buy the mining property for a price equal to the whole amount of the capital stock, whenever the treasurer should have received the amount from the stockholders; and the purchase was then made, thus: Each associate, except F. & S., gave his check to the treasurer for a sum equal to the total value at par of the number of shares assigned to him, as if in payment for said shares, and P. gave also a check for the shares assigned to F. & S.; the treasurer delivered the checks to P., taking in exchange a conveyance of the mining property; P. returned the checks to the drawers upon their paying him "the price which each had previously agreed on for his interest in the property," and "no money was paid in the transaction" except the sums thus paid to P. by the drawers of the checks. The corporation afterward levied an assessment on the capital stock, and voted "that no certificate of stock be issued until said assessment is paid" and a majority of its directors (not including F & S. or B.) filed in the office of the secretary of the commonwealth a certificate that the amount actually paid in on the capital stock of $500,000 was $175,000, and that it was invested in real estate and machinery. Upon the neglect or refusal of F. & S. to pay the assessment on the shares assigned to them, the corporation sold the shares to pay it. Before the sale, but after the assessment, F. & S. demanded of P. a certificate of their shares; and after the sale brought suit against P. for breach of the original agreement. *Held* that F. & S. had no cause of action.

Action upon the following agreement in writing, signed on January 25, 1864, by Field and Lemuel Sessions, the plaintiffs, as parties of the first part, and by the defendant as party

of the second part: "Whereas the parties of the first part have secured certain bonds of mining rights and for the purchase of gold mining properties now bonded or to be hereafter bonded or purchased, in the gold districts of Sherbrooke and Wine Harbor, Nova Scotia; they hereby agree to transfer to the party of the second part said mining rights, privileges and bonds, at cost, upon the following terms and considerations: First, that the said party of the second part shall furnish the money to secure said bonds and to pay for said properties, at such times and in such amounts as may be jointly agreed upon by both parties, it being distinctly understood that the parties of the first part shall not be authorized to bind said party of the second part to any purchase except by his written consent. Second, that said party of the second part shall organize one or more corporate companies, either in New York or Boston, with such capital stock and with such number of shares, as in his judgment he may deem proper, he giving to said parties of the first part one equal tenth part of all the shares so issued by one or more companies to be so organized by said party of the second part, and all expenses of reports, etc., attending the organization of said companies, to be paid by said party of the second part."

The declaration in its first count alleged the signing of this agreement, the transfer by the plaintiffs to the defendant of all their mining rights, privileges and bonds in pursuance thereof, the organization by the defendant of a corporation called El Dorado Gold Mining Company, at Boston, the purchase by this corporation from the defendant of property so transferred to him by the plaintiffs, and the neglect and refusal of the defendant to give to the plaintiffs one tenth part of the shares of the corporate stock; and in the second count, after alleging the signing of the agreement and the transfer of the mining rights, privileges and bonds, to the defendant, alleged that the defendant, for the purpose of deceiving the plaintiffs and the public, claimed to have effected an organization of such a corporation to work said mining property, but that the pretended organization was illegal and void, by reason of its false and fraudulent character, and the shares in the corporate stock were worthless. The answer admitted the allegations of the first count, except as to any failure of the

defendant to fulfill his obligations under the agreement, and alleged that the plaintiffs had not fully performed all their obligations under it, but had received money from the defendant to pay for some mining property which they never transferred to him; and as to the allegation of fraud in the second count, it set up that if there was any fraud, the plaintiffs were participants therein. And the defendant filed an account in set-off for "money furnished to the plaintiffs for the purchase of mining properties since January 25, 1864, and not accounted for."

Trial, without a jury, before the Chief Justice, who reserved the case for the determination of the full court on a report, of which the following are the material parts:

"It appeared in evidence that the defendant furnished the money; that the property which formed the capital of El Dorado Gold Mining Company was conveyed to him, either by Field or Sessions, in whose names a considerable part of it was purchased, or by direct conveyance from the government of Nova Scotia; that he sold a portion of his interest in it to several persons, and on April 18, 1864, these persons met with him and Field at Boston, and signed an agreement to form a corporation under the Gen. Sts. c. 61. Field was present and signed the agreement. Sessions had previously requested that the stock of the plaintiffs should be conveyed to Field. The agreement fixed the capital stock at $500,000, divided into one hundred thousand shares, at five dollars each, and specified the number of said shares to be assigned to each of the parties named, and ten thousand shares were specified as belonging to Field. This was the only meeting of the associates that Field ever attended. At that meeting a notice was issued for a meeting to organize the corporation, to be held on April 25th, and each associate, including Field, signed an agreement that he had received the notice. The meeting was held, officers were chosen, and by-laws were adopted. The meeting was adjourned to May 7th. At that time a vote was passed to purchase the mining property offered to the company by the defendant, for $500,000, whenever the treasurer should have received said amount from the stockholders. It appeared in evidence that the purchase was afterward made in the following manner: Each of the asso-

ciates, except Field, gave his check to the treasurer of the company for the number of shares assigned to him at five dollars each. The defendant gave his check for the plaintiff's shares. It amounted in all to $500,000. The treasurer paid them to the defendant, and took a conveyance of the property. The defendant then returned them to the drawers, they paying him the price which each had previously agreed on for his interest in the property. The defendant objected to evidence of what was done with the checks. No money was paid in the transaction, except that each proprietor paid to the defendant such sum as he had agreed to pay for his interest in the property. At an adjourned meeting, held June 2d, a vote was passed expressing satisfaction with the titles to the property, and authorizing their completion; and it was also voted 'that an assessment of twenty-five cents per share be levied upon the capital stock of the company, payable as soon as the organization shall be completed, and that no certificate of stock be issued until said assessment is paid.' The defendant was present at this meeting. On August 5th, a majority of the directors subscribed and made oath to a certificate, which was filed in the office of the secretary of the commonwealth and published, 'that the amount of the capital stock of said corporation is $500,000, divided into one hundred thousand shares of the par value of five dollars each, and that the amount actually paid in is $175,000, now invested in the real estate and machinery of the company at Wine Harbor, Nova Scotia.' The defendant did not sign it, and objected to it as evidence.

"The plaintiff, Field, gave to Matthew D. Field, his father, a power of attorney to make a transfer of his stock. Some time during the summer after the organization, Matthew D. Field called on the defendant on behalf of the plaintiffs, and asked him to furnish the stock. The plaintiffs also went to New York, March 28, 1865, and demanded the stock. The defendant declined to furnish it, and contended that the assessment should be paid first. Field contended that they were not bound to pay it, and on August 29, 1865, he transferred the shares to Columbus Canterbury without any consideration, and the transfer was entered on the books of the company. Certificates were not issued, but the company sold the

shares to pay the assessment. Matthew D. Field protested against the sale, but was present at it and bid off the shares for thirty cents each. This was the amount of the assessment, interest and costs. The sale of the stock took place in February, 1866.

"The plaintiffs contended that they were entitled to recover the market value of the shares at the time when the organization was completed, on the ground that it was the defendants' duty to see that the ten thousand shares were issued to them, or were at least paid for, and not subjected to the incumbrance of the assessment of twenty-five cents per share. The defendant contended that, by permitting Field, with the assent of Sessions, to become a member of the corporation in the manner above stated, he fully performed his agreement; that, if the stock was fully paid for by the checks, then the assessment was void, and the remedy of the plaintiffs was against the company or its officers for not issuing the certificates; that, if the checks were not a full payment for the shares, the stock could not be legally issued, and the contract was contrary to our statutes against stock-jobbing. He further contended that the plaintiff, Field, assented to the assessment. But, beyond the fact that he was present at the first meeting and signed the papers above mentioned, the evidence was contradictory on this point, and nothing was proven. He also contended that the assignment of the stock to Canterbury by Matthew D. Field, under his power of attorney, and the making of the power, was a bar to the action.

"He further contended that the plaintiffs could not maintain the action, because they had not performed the agreement on their part. On this point, the following facts appeared in evidence: The mining property referred to in the contract was situated at Wine Harbor and at Sherbrooke, Nova Scotia. The government was the proprietor of mining rights, and laid out the mining property in small lots, which it sold to private parties for a certain royalty to be paid yearly, and if this was not paid yearly the right was forfeited. Sessions had been furnished with money by the defendant, with which he had, according to the agreement, purchased certain lots, taking the conveyances to himself, and it was the

intention of the parties that some of these should be conveyed to a corporation to be organized in New York. After the assessment had been voted, in March, 1865, the plaintiffs went to New York to see the defendant, and demanded the stock which they were to have in El Dorado Gold Mining Company. In the course of the conversation, the defendant said he supposed it was his business to pay the royalty on the lots then held by Sessions; to which Sessions replied that he had directed them to be paid as they should become due. He had directed his agent, Tobias Ross, to draw on him for the amount becoming due, being about $250. Ross drew on him, but he dishonored the draft, and the rights were forfeited. The defendant paid a large sum to redeem or repurchase the property afterward. The money with which he originally purchased the rights was furnished by the defendant, and the land forfeited was intended for the New York Company.

"The plaintiffs' second count alleged a failure to organize El Dorado Gold Mining Company by reason of the fraud of the defendant. But there was no evidence that any deception was practiced upon any of the associates. The sum of $500,000 was a fictitious estimate for the land, which cost about $25,000 in gold, and the directors, in their certificate, made August 5, 1864, stated that $175,000 was actually paid in and invested in real estate and machinery at Wine Harbor. There was some machinery on the property which had been erected for working the mines, and the purpose of the assessment was to raise a working capital. Sessions had purchased gold to the amount of $606, and returned it as the product of the mine for a period when the mine yielded less than $100, and wrote to the defendant informing him of the fact, and that it had enabled their agent to make a favorable report. But it appeared that this transaction related not to El Dorado Company, but to the property to be held by the New York Company; and it did not appear that this proceeding was a part of the original plan of the parties. There was no evidence as to the product of El Dorado mines, but they have been worked to some extent.

"In the bill of particulars, annexed to the defendant's account in set-off against the plaintiffs, he charged them for the money he advanced, and which was laid out by Sessions

for the purchase of the lots and property which were forfeited as stated above. But as Sessions used the money in making the purchases, and his fault, if he was guilty of any, appeared to have been in not preventing a forfeiture of his rights, it seemed that if the defendant had a claim it was for unliquidated damages, and was not therefore a subject of set-off."

N. A. LEONARD (G. WELLS with him,) for the plaintiffs.

A. L. SOULE, for the defendant.

AMES, J.

It appears from the report, that the plaintiffs have performed the labor and rendered the services which they agreed to furnish on their part, in the purchase of mining rights and other property in Nova Scotia, and have transferred them to the defendant at cost. He, on his part, furnished all the funds necessary to complete these preliminary purchases, and so far has fulfilled his contract. He next proceeded to draw up the articles of association necessary as the first step in the organization of a corporation under the Gen. Stat. c. 61, and the El Dorado Gold Mining Company has been duly organized under those articles. It is to be assumed that he invited and procured the subscriptions of the associates, and caused this corporate company to be so organized. The articles provide, among other things, that the capital stock of the company shall consist of one hundred thousand shares of the par value of five dollars each; and they apportion those shares among the associates, allotting ten thousand of them to the plaintiff Field, who appears to be one of the subscribers, and who, as the report finds, was to hold in the right or for the benefit of the other plaintiff, as well as for himself. The defendant, then, has fulfilled the second part of his contract, to the extent at least of organizing this particular corporate company, and causing one tenth part of its stock to be allotted to the plaintiffs. They complain that he has not "given to them," in the language and within the fair interpretation of the contract, the shares that they were entitled to receive; that he has refused, on request, to deliver the stock to them, and has insisted that they are not entitled to

receive it without first paying an assessment amounting to two thousand five hundred dollars.

The report finds that, when the company voted to buy the land and mining property at the price of $500,000, the price so fixed was wholly fictitious. It is manifest that the payment of that price was equally fictitious. The checks were never intended to be presented for payment, but were returned, after passing through the hands of the treasurer, to the several parties from whom they were received. The purpose of this device undoubtedly was to have it appear by the records of the company and by the treasurer's accounts that the nominal price of the mining property was the true price, and had been actually paid in cash. Considered as a matter between the stockholders only, it was of very little consequence what the nominal price should be, so long as it was to be paid in the easy and pleasant manner which was adopted. What particular advantage the projectors proposed to themselves by this arrangement is not stated in the report. It may be conjectured that it was supposed the stock might sell at a higher price, if the purchaser were led to believe that the company had actually invested half a million dollars in real estate and mining property. But none of the stockholders were deceived or misled by those proceedings. No deception was practiced upon them, and apparently none of the original associates have any cause of complaint. These plaintiffs do not stand in the position of innocent purchasers, who were deceived by the fictitious valuation. Even if they were not present at the meeting, they knew exactly what the property consisted of, and substantially what it had cost. All that they had any right to ask was an equal tenth part of the stock, and the question is, has the defendant in that respect fulfilled his contract?

The defendant has made such arrangements that the plaintiff Field (in this respect representing both plaintiffs) stands recorded in the books of the corporation as the owner of one tenth part of the corporate stock. The other stockholders, in order to stand in the same position, have been obliged to pay something (the report does not say how much) to the defendant, that is to say, to make terms with him for the privilege of becoming participators in the enterprise. The corporation,

for some eal or supposed advantage, has seen fit to invest, so far as the record shows, the entire amount of its capital stock in the real estate and other property conveyed to them by the defendant. It has also seen fit to receive from the various stockholders something which it was agreed should be considered as cash, and used as cash, to the full amount of the par value of all the shares agreed upon in the "articles of association." The corporation has received from the defendant, upon the ten thousand shares allotted to the plaintiffs, what it saw fit to treat and to use as cash, to their full amount. The plaintiffs do not appear to have been present at the meeting at which the vote was passed. Can the corporation say to them that the record only shows the nominal arrangement, and that the real transaction was something very different? Why are not the plaintiffs at liberty to say that their shares are paid up in full? It is undoubtedly true that the transaction is a very suspicious one; and there are some indications of a design to evade the law of the commonwealth by a false and fraudulent certificate as to the amount actually paid in; but if there was such a design, there is nothing in the report to show that the plaintiffs were parties to the specific arrangement as to the price of the property, and the payment of it. On the contrary, the corporation received as cash what the defendant paid over on the plaintiffs' shares, to the extent of one tenth part of the entire capital.

It is true that the officers of the corporation have refused to deliver to the plaintiffs the certificate provided for in the by-laws; but the certificate, though convenient as evidence of title, does not itself constitute the title. The certificate is not the stock. The corporation can not affect their rights by refusing to deliver to them the usual written evidence of their title: *Chester Glass Co.* v. *Dewey*, 16 Mass. 94; *Slaymaker* v. *Bank of Gettysburg*, 10 Penn. State, 373; *Ellis* v. *Essex Bridge Proprietors*, 2 Pick. 243. "Shares in a corporation are not chattels personal susceptible of possession, actual or constructive": *Arnold* v. *Ruggles*, 1 R. I. 165. "A share in a bank, if not a chose in action, is in the nature of a chose in action": *Hutchins* v. *State Bank*, 12 Met. 421. A share in a corporation is a right to participate in the profits, or in a final distribution of the corporate property *pro rata*. It

would seem to follow that the defendant's contract, to give the plaintiffs one tenth part of all the shares, does not mean that he shall make a manual delivery of the shares, for that is impossible; or even of the certificate. It is enough if he gives them a right to the shares and a right to demand a certificate. If the corporation, in this instance, wrongfully refuses to deliver the certificate, there is nothing in the case to show that the defendant is the party who should be held responsible. Their remedy for that wrong would be against the corporation, and not against him.

If the company, under the circumstances, had no authority, after the meeting at which the purchase, subsequently carried into effect, was voted for, to lay the assessment upon any shares belonging to persons who did not consent to such assessment, then the defendant appears to have fulfilled his contract. We see nothing in the articles of association, or in the proceedings of any meeting at which either of the plaintiffs was present, that could give to such assessment any binding force as against them, unless their express consent should be shown. What would be the effect of the purchase of the shares by Matthew D. Field, the plaintiffs' attorney, or of the transfer to Canterbury, are questions which it has become unnecessary to consider. The defendant as a stockholder may have voted for and advocated the assessment and the sale; but those acts were the acts of the corporation, and not of himself.

In this view of the case, the defendant is not entitled to recover upon his account in set-off. He has had the benefit of the money which he advanced in order to secure the purchase.

But, as the plaintiffs have failed to prove any breach of the contract, there must be

Judgment for the defendant.

WELLS, J., did not sit in this case.

THE YELLOW JACKET SILVER MINING COMPANY V. STEVENSON.

(5 Nevada, 224. Supreme Court, 1869.)

Void lease—Corporate knowledge—Receipt of royalty. Where the president of a mining company without authority from the corporation, leased the mine to a party, who entered and paid royalty from time to time, but this royalty was entered by the superintendent upon the books of the company as money for ores sold; *Held*, that the lease being made without authority was void; and that the receipt of royalty in the manner stated could not be considered a ratification because it showed that the rent or royalty was not received with a knowledge of its rental character. *Held, further*, that the knowledge of three of the board of trustees, being less than a majority, of the facts in regard to the party claiming as tenant, could not be considered the knowledge of the company; and the court intimated that knowledge by all the trustees not communicated to them as a board would not be knowledge of the company or of the trustees as a board.

Tenancy at will. The rule that one who enters under a void lease is to be deemed a tenant at will, and so entitled to notice to quit, does not apply when the entry is unauthorized.

Appeal from the District Court of Storey County, First Judicial District.

Suit to enjoin Stevenson from entering on and taking ores from the plaintiff's mines. The mining company had judgment and defendant appealed.

WILLIAMS & BIXLER, for appellant.

C. J. HILLYER, for respondent.

By the Court, LEWIS, C. J.

In the month of January, A. D. 1868, John B. Winters, the president of the Yellow Jacket Mining Company, executed in the name of the respondent an instrument whereby the appellant was given the privilege of entering upon a certain designated portion of respondent's mining ground, with the privilege of mining and appropriating to his own use all mineral-bearing rock which might be found therein, for the sum of two dollars per ton for all ore so mined and taken by him. Under this instrument, which by its terms was to continue

during his pleasure, the appellant entered upon, mined and extracted a large quantity of ore, and was so engaged when this suit was instituted for the purpose of enjoining him from further entering upon, mining or taking ores. The proceeding is founded upon the assumption that Winters was not authorized to execute the instrument or lease referred to on behalf of the company, and hence it is not holden upon or bound by it.

The evidence undoubtedly sustained this position: Winters himself testified that he had no authority to execute such an instrument on behalf of the company, or to lease any portion of the mine, and the by-laws introduced show that such power is vested only in the board of trustees, which it is admitted never delegated it to him. Not possessing the authority to act for the company in the execution of such instrument, it could not be bound by it; for it is an axiom of the law of agency that the principal is only bound by such acts of the agent as are within the scope of his authority. But it is argued for appellant that a corporation, like a natural person, may ratify an unauthorized act of its agent; and in this case, the respondent ratified the instrument executed by Winters. That it might have been adopted or ratified by the company and thereby become its own act and binding upon it, there is no doubt; that it was done, however, in this case is not established to our satisfaction. A principal is only held to ratify the unauthorized act of an agent when he does so expressly, or with full knowledge of the transaction accepts or receives some advantage from it, or when within a reasonable time after such knowledge, he fails to repudiate it.

Although the principal received advantage from such act he will not be held to ratify it, unless he accept it with full knowledge of all the material facts of the transaction.

"No doctrine," say the Supreme Court of the United States, "is better settled, both upon principle and authority, than this, that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid because founded in mistake or fraud": *Owings* v. *Hull*, 9 Pet. 629. So where it is sought to charge a corporation with

the ratification of an unauthorized act of an agent by reason of its acceptance of some benefit or advantage from it, it should appear that such benefit was accepted with full knowledge of the character of the act: Ang. & Am. Corp., sec. 304.

The evidence in this case, however, is clear and positive that the board of trustees which was the authorized agent of the corporation knew nothing of the terms, nor even of the existence of the lease in question. The money paid by the appellant was reported by the superintendent to the board as received for ores sold. Nothing seems ever to have appeared in his reports from which it could even have been inferred that the money paid by, or due from, Stevenson to the company was for the use or rental of any portion of the mine. How then can it be held that the acceptance of money by the board reported to it as being for ores sold, was a ratification of the lease executed to the appellant? The company did not know of such lease, nor were there any such circumstances connected with the acceptance of the money as to place it upon inquiry, or to charge it with presumptive notice of its existence.

If, then, it be the law that there must be a full knowledge of all the material facts, before the acceptance of profit or advantage by the principal will be held to constitute a ratification, surely the respondent here can not be held upon the lease in question, for it knew nothing of the material facts respecting it. If it were shown that the board knew of the lease, the acceptance of payment from Stevenson for the ore extracted would doubtless be sufficient to establish a ratification; but the contrary being shown, it would manifestly be opposed to the well-settled rules of law to hold such acceptance to be a ratification.

But it is further claimed that, if the lease were void and there were no ratification, still the acceptance of rent from Stevenson constituted him a tenant at will of that portion of the mine from which he was extracting ore, and therefore entitled him to notice to quit, which was not given. The fallacy of this argument is, that it assumes the corporation accepted the payment made by Stevenson as rent, when nothing of the kind is shown. True, the money was paid, but as stated before, it was reported to the board as money received

for ore sold, and not as rent for the use or occupation of any portion of the mine. It is not shown that the board of trustees had any knowledge that he had such use or occupation. The acceptance of money as rent, knowing it to be such, would undoubtedly create the relation of landlord and tenant as completely as an express contract, because the payment by the tenant would be a direct recognition and acknowledgment of the landlord's title, and the acceptance by the latter of such payment, knowing it to be paid as rent, would be as perfect a recognition of the tenant's right to occupy as an express assent or permission; consequently it has been held, and very justly, too, that the acceptance of rent, knowing it to be paid as such, creates the relation of landlord and tenant.

But the acceptance of money by the owner of land—not knowing it to be paid as rent, or believing it to be paid for something else—can not be held an assent to the use or occupation, nor create such relation: *Doe* v. *Crago*, 6 C. B. 90. Not knowing of such occupation, an assent to it could not, with any degree of consistency, be presumed to be given. Here there is no evidence that the board of trustees, as such, knew of Stevenson's occupation; and the acceptance of the money paid by him, could not raise a presumption of such knowledge; because it was returned as for ores sold, and as such it appears to have been accepted by the company. Were it returned as rent and so accepted, a tenancy would be created, for that fact alone would be a sufficient notification to the company that Stevenson was occupying a portion of the mine, and the acceptance of the rent would be a sufficient assent to such occupancy. But the law does not force contracts upon persons by presumptions unnatural or improbable. Legal presumptions are natural and rational inferences drawn from known or admitted facts. As for example, if one accepts rent from another in possession of his property, knowing it to be paid as rent, the natural presumption is that he assents to the possession, and such is the presumption of the law; but it would not be rational or natural to infer an assent to such possession if the money were accepted, the owner not knowing it was paid as rent; nor do we think the law raises it in such a case.

Perhaps, if it were shown that money was paid by one oc-

cupying premises, as rent, and that it was accepted by the owner, with nothing further appearing, it might be presumed that the owner knew it to be intended as rent, and so accepted it; but where, as in this case, it is shown, in connection with the proof of payment, that it was reported to be for something other than rent, and so received, such presumption can not be indulged.

It can not, we think, be maintained that the knowledge obtained unofficially by three of the trustees, that Stevenson was engaged in extracting ore from the mine, is sufficient to charge the company with such knowledge. As any number of trustees, acting individually and not as a board, can not act for the corporation, so any information obtained by individual trustees and not communicated to the board, should not, it would seem, become the foundation of a contract binding upon the company. The trustees represent the corporation only when assembled together and acting as a board: Laws, 1864–5, 360, secs. 5, 7; see, also, *Gashwiler* v. *Willis*, 33 Cal. 11. Such being the law, how can it be claimed that information communicated to them individually, but not to the board, can be made the foundation of an implied contract on the part of the corporation? But, however this may be, it can not possibly be maintained that a corporation can be charged with acting upon, or recognizing a fact which is known only to a minority of its trustees. As it requires a concurrent action of a majority to execute an express contract on its behalf, the action of, or information communicated to any number less than a majority, can not become the basis of a contract, binding upon the company. In this case the three trustees who knew that Stevenson was extracting ore from the mine, might be deemed to assent to it—still unless they constitute a majority of the members of the board, their action or implied assent could no more bind the corporation than an express contract entered into by any one of them alone could. The record here does not show that three were a majority of the board of trustees of the plaintiff—a fact necessary to be shown by the defendant before he could claim the corporation to be bound by their act, or be chargeable with information obtained by them. So, even if it were admitted that the act of a majority of the trustees, not acting as a board, could bind the corporation, still

as it is not shown in this case, that a majority did so act, or have knowledge of Stevenson's possession, the result here would be unchanged.

The authorities referred to in support of the proposition, that one entering under a void lease is to be deemed a tenant at will, and so entitled to notice to quit, have no pertinency to the facts of this case. When an owner allows one to enter upon his property, under a lease rendered void by reason of some informality, undoubtedly a tenancy at will may thereby be created—because, although the lease intended to be executed be nugatory, still the entry and taking of possession are by the permission of the owner; and in such case the tenancy is created by the acts of the respective parties irrespective of the lease attempted to be executed. The case is, however, very different where there is not only a void lease, but the entry upon the premises is also unauthorized. As for example, if a stranger to the owner should, on his behalf and in his name, make a lease of his property, and the lessee should enter into possession under it, he could certainly not be held a tenant at will, and entitled to notice to quit from the owner. But the president of the plaintiff had no more authority to lease any portion of its mine than if he were an entire stranger. Not having the authority to lease, it follows he had no authority to place any person in possession of the mine, or any portion of it, as a tenant—for such possession can only be derived from one having the right or authority to lease—hence, not only was the lease executed by Winters void, but any possession given to, or right of tenancy attempted to be conferred upon Stevenson, by him, was entirely unwarranted. There could, therefore, be no tenancy at will created by means of the possession so obtained. If Winters had the authority to lease and did so, placing the defendant in possession, and the lease, by reason of some informality, proved to be void, doubtless, Stevenson would in such case be held a tenant at will, but Winters having no such authority, Stevenson could acquire none of the rights of tenancy from him—for as an agent, Winters could no more bind his principal by giving a possession which would create a tenancy, than by executing a written lease of the premises.

The appellant having failed to establish the relation of

landlord and tenant between himself and the respondent, and this being the only ground relied on, the order of the lower court against him must be affirmed.

Judgment affirmed.

FAULDS v. YATES ET AL.

(57 Illinois, 416. Supreme Court, 1870.)

[1] **Combination by part of stockholders to control corporation.** F., Y. and B. owned the majority of stock in a company incorporated for the purpose of mining coal, and having leased the company's coal lands as partners, entered into an agreement that they would determine among themselves as to the directors and other officers of the company, and if they could not agree they would ballot for such officers, that the majority should rule, and their vote be cast as a unit so as to control the election. *Held*, that this agreement was not void, as against public policy: the persons owning a majority of the stock have a right to combine and thus control the selection of officers and management of the property.

[2] **Purchase of coal lands by one partner with partnership funds—Conveyance compelled.** Real estate belonging to a partnership will in equity be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership, and be made to account to the other partners. So where coal lands were purchased by one of three partners in his own name, but with money contributed in equal proportions by all parties—upon a dissolution, it was held proper to compel the partner, holding the title, to convey to his copartners their proportionate interest.

Specific relief against partner. In a suit between partners to compel the conveyance of land, it will be granted only upon the specific terms of the agreement for the purchase, and if the purchasing partner states that he paid a larger price than in reality he did pay, and thereupon his copartners advance more than their proper proportion of the purchase money, the partner making such misrepresentations, can not, in such a suit, be compelled to refund the excess.

Parties. In such a suit the corporation is neither a necessary nor proper party.

Writ of error to the Circuit Court of Iroquois County; the Hon. CHARLES H. WOOD, Judge, presiding.

[1] See *Titus* v. *Minnesota Co.*, 8 Mich. 183.

[2] See *Densmore Co.* v. *Densmore*, 3 M. R. 569.

DENT & BLACK and EDWARD H. BRACKETT, for the plaintiff in error.

W. BUSHNELL and J. C. CHAMPLIN, for the defendants in error.

By the Court, THORNTON, J.

The Chicago Carbon and Coal Company, a corporation organized under a special law, issued certain shares of stock. A majority of the shares were purchased by plaintiff in error. The company owned a large amount of lands valuable for coal and had leased them to one Kirkland until May 1, 1866, with the privilege of a renewal for three years, in consideration of 15 cents per ton for each ton of coal mined, until the opening of certain new mines by the company. After that he was to pay $5,000 per year as rent for the demised premises. Kirkland assigned this lease to Faulds, Yates and Bunn, and this transfer was approved and consented to by the company by a resolution entered upon its minutes, on the 31st of January, 1866. They assumed by an indorsement on the lease all the responsibility and liability which Kirkland was subject to by virtue thereof.

On the 1st of February, 1866, Faulds, Yates and Bunn executed articles of copartnership in which the stock owned by Faulds was valued at $60,000, and Yates and Bunn agreed to purchase two thirds of it for $40,000, and Faulds was to superintend the mining operations, and Yates and Bunn to furnish two capable men to sell coal, and generally manage the financial affairs of the concern; and it was expressly understood that each party was to be equally interested in the business. These parties embarked their money, in equal proportions in the purchase of this lease for the purpose of prosecuting mining operations, and the development of the mineral resources of the Chicago and Carbon Coal Company. The written agreement constituted essentially a partnership. It was a voluntary contract between persons, to place their money in a lawful business and to share the profits and loss in equal proportions.

The shares of stock purchased by defendants in error were paid for, and after the formation of the partnership the min-

ing operations commenced, and continued until December, 1866. During this time the defendants in error furnished to Faulds over $19,000, which were used by him in carrying on the business. This amount was expended by him, and yet no profits were realized by Yates and Bunn, and Faulds failed to pay his share or, indeed, any part of the expenditures.

After the formation of the partnership, Faulds purchased the "Sanger tract" of land, as it is known in the record, for $8,000, but represented to Yates and Bunn that he had paid for the same $9,000; that this tract was essential to their successful operations; and induced them to purchase two thirds of the tract at $6,000, which they paid, but received no deed to the land. The agreement was, that a deed should be made.

In December, 1866, Faulds abandoned the work, and wholly failed to perform his part of the agreement, and soon after, Yates and Bunn commenced their suit in chancery for a dissolution of the partnership, and an account and the conveyance to each of them of the undivided one third of the "Sanger land."

The bill charges fraud and misrepresentation in regard to the sale of the shares of stock. The misrepresentation is fully proved, but was prior to the formation of the partnership. The representations in regard to the value and cost of the stock were proved to be untrue; but they were made as recited in the written contract between the parties before its execution.

It may fairly be deduced from the evidence that the "Sanger tract" was purchased by Faulds with the design that it should constitute a part of the partnership property.

The court below decreed that the plaintiff in error convey to each of the defendants in error the one undivided third of the "Sanger tract" and pay to them $666.67, the excess paid by them for the Sanger land, and the one third part of $19,259.16, the amount advanced by defendants in error in the mining operations.

A reversal of this decree is asked for upon the following grounds: 1st. That the agreement between the parties is void as against public policy. 2d. That there can be no chancery jurisdiction arising out of the Sanger tract of land,

and that there was full remedy at law. 3d. That the evidence does not sustain the allegations of fraud.

There were 1,300 shares of stock of the Chicago Carbon and Coal Company, not owned by Faulds, Yates and Bunn. They did, however, own more than one half of the shares; and it was provided in the agreement between them that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the company, and that if they could not agree they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election.

It is contended that these parts of the agreement were intended for dishonest and fraudulent purposes, and were in conflict with the interests of the other stockholders, and absolutely void.

It should be remembered that the lease, by virtue of the assignment and renewal of which these parties obtained possession of the property, was made in 1863; and hence its terms and conditions were determined three years before Faulds, Yates and Bunn purchased any stock. The old board of directors approved the renewal of the lease, and then these parties, and two others were elected directors.

The record wholly fails to disclose any injury to the other shareholders—any waste of the property; but, on the contrary it appears that Bunn and Yates furnished for the improvement of the property over $19,000. There was no fraud in the agreement, which has been so bitterly assailed in the argument. There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, that the whole are bound by the acts of the majority, when the acts conform to the law of their creation.

The co-operation, then, of these parties in the election of the officers of the company, and their agreement not to buy or sell stock except for their joint benefit, can not properly be characterized as dishonest and violative of the rights of others,

and in contravention of public policy. If one man owned a majority of the stock he surely had the right to select the agents for its honest management. These three persons had formed a partnership for mining under the lease of the company. They knew they must make large expenditures of money. Incompetent and unfriendly directors and officers might involve them in much trouble, heavy expense and useless litigation. They had a double interest to protect—their interests as shareholders, and their interests as lessees. It is strange that a man can not, for honest purposes, unite with others in the protection and security of his property and rights without liability to the charge of fraud and iniquity.

This agreement was made between persons who had invested a large amount of capital in an enterprise somewhat perilous. As shrewd, skillful and prudent men, they were desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders. They could not destroy the property of the company, for the lands were of immense value if the mineral resources failed. If they increased the value of their own stock, they also increased the value of all other stock. If they destroyed the stock of others, they also, by the same act, destroyed their own. It is absurd to suppose that a sane man will ruin himself for the mere pleasure of ruining others.

The agreement complained of was entered into by Faulds and his partners. The shareholders, whom he is so solicitous to defend and protect, have not complained. He can not invoke their shield to fight imaginary wrongs. The transaction which he, through his counsel, denounces as fraudulent and nefarious, was conceived and consummated by him, as much as by his partners. Every motive which could influence a man for good, should have prompted him to silence.

If this combination was fraudulent and intended for bad purposes, the stockholders, who are in a minority, and who may have suffered, have ample redress. We prefer to listen to them before any decision as to their wrongs.

The cases cited to sustain the position, that this agreement is void, are unlike the case at bar. In *Hawley* v. *Cramer*, 4 Cowen, 717, it was held that a purchase by an attorney for

three of his clients was fraudulent as against the other two, who were absent; also, that an agreement between different persons, not to bid against each other, but to divide the profits was against public policy.

In *Randall* v. *Howard*, 2 Black (U. S. R.), 585, it was decided that the law would not enable either party, in controversies between themselves, to enforce an agreement in fraud of the law or which was made to injure another. In *Wheeler* v. *Sage*, 1 Wallace, 518, the same general principle is declared, as in the case of *Randall* v. *Howard*, *supra*.

The agreement in this case was not for the injury of the minority stockholders. It could not have been so intended, and we can not perceive that it could so operate. The selection of proper officers, the prudent management of the coal mines, the careful sale and purchase of stock, as provided for in the agreement, together with the expenditure of money in the improvement of the property, must have resulted in benefits to all the stockholders, and not alone to the parties to the particular agreement.

A careful reading of the contract shows no hidden advantage intended, no fraud, no dishonesty. For aught which we can discover in the record, if Faulds had performed faithfully on his part, this litigation might have been avoided, and the partnership have prospered.

It is next insisted that no relief can be granted as to the "Sanger land." The preponderance of the evidence is that this land was purchased for the partnership.

Faulds denies that he sold it to Bunn and Yates, or that he purchased of Sanger, but admits that he told Bunn that he and Yates must join him in the purchase. Yates testified that Faulds informed Bunn and himself of the purchase; that this land was essential to the prosecution of their business, and that he requested them to join him; that they did so, and each paid $3,000. Bunn fully corroborates Yates. Faulds is contradicted by Sanger who testified that he did sell the land to Faulds, and received from him the sum of $5,800 in part payment, about the first of April, 1866. This was about the time defendants in error paid the $6,000.

Notwithstanding the denial by Faulds, we are forced to the conclusion that he at least is mistaken, and that the "San-

ger land" was purchased as partnership property; and that Bunn and Yates each paid $3,000 therefor. The balance of the purchase money was paid by Faulds.

This land, then, was bought for the use of the partnership. The funds of Bunn and Yates were paid as a part of the purchase money. Common honesty requires that each of them should have a conveyance of one third of this land. Real estate belonging to a partnership will, in equity, be treated like its personal funds and distributed accordingly. The party in whose name it stands should be held as a trustee of the partnership, and be made to account to the partners according to their several rights and interests.

There was, however, error in the decree, in directing that Faulds should refund $666.66⅔ which, it is alleged, he received above the actual amount of purchase money for the Sanger land. The other partners agreed to pay $6,000 for two thirds of it. This was the contract. They have affirmed it by the allegations of the bill. They might have abandoned it and sought other relief. But when a conveyance of the land is asked it must be granted upon the specific terms of the agreement.

In this case the means of information, as to the value of the land, were alike open to all parties. Bunn and Yates were upon the land, before payment, and made some examination of it. In such cases equity will not relieve.

The objection is taken to the decree, that it orders a conveyance to Yates and Bunn by a joint warranty deed of an undivided one third part of the Sanger lands. This is not true, in fact. The decree directs that the "defendant convey unto each of the complainants, by a general warranty deed, an undivided one third part," etc.

It is unnecessary to advert to the objection, that the allegations of fraud are not sustained by the proof. The agreement between the parties was one of partnership for the management of the leased property, and the plaintiff in error should be compelled to account, particularly as a decree of dissolution had been entered by agreement of the parties.

We do not think the Chicago Carbon and Coal Company was a necessary or even a proper party. Neither the stock nor the property of the company could be affected by any decree which could have been rendered. The corporation had no interest in the private affairs of these parties.

The decree of the court is reversed, so far as it directs the plaintiff in error to refund the sum of $666.66⅔ and is, in all other respects affirmed; and the court below is directed to make this modification.

The decree is reversed and the cause remanded, with direction to make the modification suggested.

Decree reversed.

WRIGHT v. THE OROVILLE GOLD, SILVER AND COPPER MINING COMPANY ET AL.

(40 California, 20. Supreme Court, 1870.)

[1] **Corporate title where vested.** The legal title to the property of a mining corporation is vested in the corporation and not in the stockholders as such.

Powers of trustees. The Board of Trustees of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority.

Corporate acts bind stockholders—Alienation of property. Corporate acts, by which corporate property is alienated, if done pursuant to the prescribed mode, and not being in themselves *ultra vires*, are in point of mere law, binding upon the corporate title; and through that title equally binding upon the interest of the stockholders.

Equity looks beyond the forms of law. In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been exercised, in good faith, to promote the interest of the stockholders.

[2] **Corporate authority a trust.** The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest.

[3] **Injunction at suit of stockholder.** A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them

[1] *Gashwiler* v. *Willis*, 3 M. R. 516; *Denver & R. G. Co.* v. *Canon Co.*, 99 U. S. 463.

[2] *Cumberland Co.* v. *Sherman*, 1 M. R. 322; *Cumberland Co.* v. *Parish*, 1 M. R. 423.

[3] *Parrott* v. *Byers*, 40 Cal. 614; *Post* STOCK.

from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred.

Idem. The court will interfere to relieve an injured stockholder from loss after such an act has been done, provided no superior equity has intervened nor the rights of innocent third parties attached.

Stockholders' right to redeem mine—Collusion between corporation and creditor. A. transferred mining ground to a company formed to work it, in consideration of a little less than half the shares (990), the other stockholders holding a majority (1010), but the company agreed to levy assessments and work the mine. Instead of so doing, they allowed a debt to be contracted and the mine to be sold, making no effort at redemption, the president himself being interested in such debt: *Held*, that such conduct amounted to gross fraud upon the vendor. And that the stockholder having redeemed the land from the sale, the corporation should refund to him the purchase money, within a set time with interest, and that otherwise the title should vest in such redeeming stockholder.

Appeal from the District Court of Butte County, Second Judicial District.

G. F. & W. H. SHARPE, for appellants, who were defendants below.

W. C. BELCHER and J. M. BURT, for respondent.

WALLACE, J., delivered the opinion of the court; TEMPLE, J., CROCKETT, J., and RHODES, C. J., concurring.

It appears that Jennings, being the owner of certain mining property and grounds, the Oroville Gold, Silver and Copper Mining Company was organized and incorporated with a view to purchase them. The capital stock of the corporation consisted of 2,000 shares, of the nominal value of $100 per share, and Jennings sold this mining property to the corporation for 990 full paid shares of its stock, and the remaining 1010 shares, issued to the other stockholders, were to be assessed so as to carry forward the working of the mine, etc.

In point of fact, however, the assessment upon these shares, afterward imposed, did not exceed twenty per cent. upon their nominal value, and the result was a debt incurred by the corporation to one Josephi, a mortgage by the corporation to secure its payment, a foreclosure of the mortgage,

and a sale under a decree for upward of $8,000, at which sale Josephi, at that sum, became the purchaser of these entire mining grounds, which were worth some $16,000, and were all the property owned by the corporation. There was no effort on the part of the corporation to redeem from the sale; in fact, the president of the corporation was himself interested with Josephi in the mortgage debt, and the president and some of the trustees, who controlled the corporation, contrived to bring about this mortgage sale with a view to deprive it of the title to the property and cause it to vest in Josephi. The result of this maneuver (and doubtless its purpose) was to wrong Jennings out of the entire consideration he was to receive for the property which he had sold to the corporation.

In pursuance of this scheme nearly the whole period of time allowed by law for redemption was permitted to elapse without an effort on the part of the corporation or its officers to redeem from the sheriff's sale. In fact the last redemption day had arrived, and still no step toward a redemption had been taken. Under these circumstances, and near the close of that day, Jennings himself, in behalf of the corporation, tendered to the sheriff the necessary amount to effect a redemption, and that officer, under the direction of Josephi, the purchaser at the sheriff's sale, accepted the money so tendered.

Subsequently, Jennings assigned to the plaintiff, Wright, all his shares of stock, and his claim against the corporation by reason of the redemption from the Josephi sale; and thereupon the plaintiff, Wright, made a demand upon the corporation, who still retained possession of this property, for the repayment of the moneys so advanced by Jennings to effect the redemption, and upon refusal, he brought this action.

The court below adjudged that the corporation repay this amount, with interest, within sixty days, and if not so paid, then that the title to the mining property vest in the plaintiff.

From this decree the corporation brings this appeal.

The mere legal title to this mining property is undoubtedly vested in the corporation itself, and not in the stock-

holders as such. The Board of Trustees may, therefore, control the property, provided that, in doing so, it do not act beyond the limit which the law has assigned to the exercise of corporate authority. Corporate acts, by which corporate property is alienated, if done pursuant to the prescribed mode, and not being in themselves *ultra vires*, are, in point of mere law, binding upon the corporate title; and through that title, equally binding upon the interest of the stockholders themselves. The Board of Trustees is the elected representative of the shareholders, who have, by the fact of election, conferred this authority upon it.

But the courts of equity, in dealing with the relations between the corporation and its officers upon the one hand, and the stockholders upon the other, in the management of the corporate affairs, look beyond the mere observance of the forms of law, and inquire if the authority has been, in good faith, exercised to promote the interest of the stockholders. The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted at least with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. And it is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts when done, would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred: *Dodge* v. *Woolsey*, 18 How. 341.

And upon the same principle the court will, even after such an act has been done, relieve an injured stockholder from loss if, in the meantime, no superior equity has intervened, nor the rights of innocent third parties attached.

It appears, in this case, that the corporation, having acquired all its property from Jennings, gave him as the consideration therefor a little less than one half of its entire capital stock, and issued to other persons the remainder of the stock. By this means Jennings lost the control of the property; and while it was agreed that the necessary working funds should be raised by assessment of the stock of these

other persons, those who were to be thus assessed were clothed with the entire authority of regulating the assessments. Jennings would, of course, be out-voted whenever a question of the propriety of levying an assessment was in hand. The assessment-paying majority had the most absolute security, in this case, against the levying of excessive assessments upon them, and seem to have made good use of that security. The same majority, with the president and trustees at their head, soon found it more convenient to allow the corporation to contract a large debt than to assess themselves at all.

The record exhibits the grossest breach of duty and good faith upon the part of the president and trustees toward Jennings. They not only did not keep their promise to him—that they would provide the means of working the mine by levying assessments on the assessable stock—but they actively engaged in a scheme to deprive him of his property altogether, and used their corporate power to promote that end.

The president, who was bound by every consideration of honesty and honor to use his earnest endeavors to protect the interest of Jennings (which had been put in peril by the failure to collect the stipulated assessments) acquired for himself an interest in the debt to Josephi. He was thus become really a creditor of the corporation and of Jennings, while he seemed to be a joint debtor with them. He was a trustee of Jennings, by virtue of his position as a member of the Board, while really he was exercising all his authority to sacrifice the interest of his *cestui que trust*, and to place the trust property into the hands of a stranger. At the last moment, Jennings prevented the consummation of the wrong by paying off the debt with his own funds. There was then remaining no other means to defeat the scheme. It is difficult to see why Jennings might not protect himself in this manner.

Nor was the payment Jennings thus made merely voluntary on his part, in that sense which would deprive him of recourse against the corporation. His relation to the Josephi debt, arising out of his being a stockholder in the corporation, and as being, therefore, to some extent, personally liable therefor, gave him such an interest in the discharge of the

debts as not only entitled him, if he chose, to pay it off altogether, but the circumstances here appearing constituted him the equitable assignee of the certificate of sale, and subrogated him to the rights of Josephi himself as the purchaser of the property at the foreclosure sale.

I see no error in the judgment—certainly none against the appellant.

Judgment affirmed.

SPRAGUE, J., expressed no opinion.

BRADLEY V. BALLARD ET AL.

(55 Illinois, 413. Supreme Court, 1870.)

Judicial conclusions from corporate name—No ultra vires after benefits received, against executed contract. Where a corporation, organized in Illinois, had borrowed large sums of money which it had used in Colorado Territory, for which money it had given its notes, now held by Ballard and others, the court refused to issue an injunction at the instance of a stockholder, to restrain the collection of such notes, on the ground of the corporation having exceeded its powers by operating beyond the State, because: 1. From the very corporate name of the company, "North Star Gold and Silver Mining Company," the complainant must have known that it was not intended to mine in the State of Illinois; 2. That in any event, the contract was an executed one, and one of which the corporation had already received all the benefit; to which class of contracts, at such stage, corporations can not object that they were *ultra vires;* 3. That a stockholder who failed to apply for a restraining writ while the contract remained executory, will be presumed to have assented to such contract.

Municipal and private corporations distinguished. Municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers can not be made binding upon the tax payers, from the presumed assent of the latter.

Appeal from the Circuit Court of Cook County.

KNOWLTON, JAMIESON & SCALES, for appellant.

GEORGE HERBERT and GEORGE G. BELLOWS, for appellees.

By the Court, LAWRENCE, C. J..

This was a bill in chancery, brought by Bradley against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the Circuit Court of Cook County, against a corporation called "The North Star Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The court sustained a demurrer to the bill, and the complainant not asking to amend, a decree of dismissal was entered.

It appears by the averments in the bill that various persons associated themselves together in the city of Chicago, in the year 1866, and filed their articles of organization in the Circuit Court of Cook County, under the general incorporation law, whereby they became incorporated under the title above stated. The statute requires the certificate to state the town and county in which the operations of a company thus incorporated are to be carried on, and the certificate of this company stated that their operations were to be carried on in the city of Chicago, in the county of Cook and State of Illinois. It further appears from the bill that the company thus organized engaged in mining in the Territory of Colorado, and in the prosecution of that work borrowed large sums of money, for which the notes described in the bill were given, except some that are alleged to have been given for official salaries. It is not claimed that they were not given for a full and fair consideration, but their cancellation is sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute, and that this purpose was known to the lenders of the money. It is insisted that although the business of the corporation was mining, yet, by the terms of its certificate it had no power to prosecute that business beyond the limits of the city of Chicago, or certainly not beyond the limits of this State.

Whether this is the proper construction of the statute, is a question we do not find it necessary to decide. Conceding that it is, and that this corporation had no power to engage in mining in Colorado, we are still of opinion the complainant has not, by his bill, entitled himself to relief. He became a stockholder to the extent of $25,000, and from the name and

character of the company he must have known it was organized for the purpose of mining beyond the limits of this State. He subsequently became one of the directors of said company, and it is a legitimate inference from the bill that at least a part of these debts were created while he was thus participating in the control of the company. There is no pretense in the bill that he ever in any mode objected to the mining operations of the company in Colorado, or to the borrowing of money therefor, and the fair, and, indeed, unavoidable inference from the nature of the company, the connection of complainant with it, and the silence of the bill in this regard, is, that he did not object. On what ground, then, can he ask a court of equity to enjoin the collection of these notes?

It is said by counsel for complainant, that a corporation is not estopped to say in its defense, that it had not the power to make a contract sought to be enforced against it, for the reason that if thus estopped its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true, but when, under cover of this principle, a corporation seeks to evade the payment of borrowed money on the ground that although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.

Neither is it correct to say, that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true, it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest,

in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act, *ultra vires*, has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations can not be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract, *ultra vires*, is made between a corporation and another person, and while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.

Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter, the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway. Could any court permit the corporation when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor, it employs a superintendent to build it, and hires mechanics by the day. Could it escape the payment of their wages, on the ground that it had employed them in work *ultra vires?*

In cases of such character, courts simply say to corporations: you can not in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.

We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice: 2 Kent, 11 ed. p. 381, note; *Zabriskie* v. *C. C. & C. R. R. Co.*, 23 How. (U. S.) 381; *Bissell* v. *M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Cary* v. *Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *Parish* v. *Wheeler*, 22 N. Y. 494; *De Groff* v. *Am. Lin. Th. Co.*, 21 N. Y. 124; *Argenti* v. *San Francisco*, 16 Cal. 255; *McCluer* v. *Manchester & L. R.*, 13 Gray, 124; *Chapman* v. *M. R. & L. R. R. Co.*, 6 Ohio, 137; *Hall* v. *Mut. Fire Ins. Co.*, 32 N. H. 297; *Railroad* v. *Howard*, 7 Wallace, 413.

If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrray, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether *ultra vires* or not, was unquestionably the sole purpose for which the corporators associated themselves together; and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended.

What we have said applies only to private corporations organized for pecuniary gain. If, to increase their profits,

they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority. But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers can not be made binding upon the tax payers, from the presumed assent of the latter.

There are some vague charges in the bill of conspiracy, between the holders of the notes upon which suit has been brought and some of the directors, but no facts are alleged showing, or tending to show any wrongful or fraudulent intent. The alleged conspiracy seems merely to be an understanding between the holders of the notes and the majority of the directors, by which the latter will allow the former to obtain judgment on their notes, and we do not perceive why they should not. If the complainant has had the misfortune to associate himself with persons of less pecuniary responsibility than himself, for the purpose of carrying on a hazardous business, in which heavy debts have been incurred, it is a misfortune of which the courts can not relieve him, merely on a vague and general charge of conspiracy against his fellow stockholders or directors. No facts are alleged in this bill which can be made the foundation of relief. As before remarked, the counsel of appellant has presented his case simply on the question of corporate power. We are of opinion the demurrer was properly sustained to the bill.

Decree affirmed.

Mr. Justice SCOTT dissents.

DENSMORE OIL COMPANY v. DENSMORE ET AL.

(64 Pennsylvania State, 43. Supreme Court, 1870.)

Vendor and purchaser—Fraud. Persons who own property of any kind may form an association with others and sell it at any price, without regard to the original cost, if there be no fraudulent misrepresenta ion. The vendors are not bound to disclose the profits which they may realize. They are not agents or trustees in their original purchase and there is no confidential relation which affects them with a trust.

[1] **Confidential relation of members of association—Accounting.** But from the time persons form or begin to start such association, they stand in a confidential relation to each other, and to future members, and none of them can purchase property for the purpose of the association, and sell it at an advance, without a full disclosure of all the facts. Such persons must account to the company for the profits.

January 4, 1870. Before THOMPSON, C. J., READ and SHARSWOOD, JJ. AGNEW, J., at Nisi Prius.

Appeal from Nisi Prius. In equity.

On the 14th of November, 1865, the Densmore Oil Company filed a bill against Amos Densmore, Emmett Densmore, Jonathan Watson, Clinton Roudebush, Adolph Hugel, Elisha D. Whitney, Francis C. Lawrence, and Ira Canfield—Lawrence and Emmett Densmore were not served.

The bill set out as follows, viz:

1. The plaintiffs are a corporation under the act relating to corporations for mechanical, etc., purposes. * * *

3. About March, 1864, the defendants, Densmore, Watson, Roudebush and Canfield, having acquired title to certain oil lands, etc., in Venango county and elsewhere, and, believing that they could acquire rights to others, visited Philadelphia to obtain and to bring about the organization of an oil company to buy their lands, etc., and induced the other defendants to become confederates with them, upon promise of a share of the profits.

4. A paper was prepared by them to procure subscriptions for stock, and, after a few influential names and their own were signed for a large number of shares, it was handed about for general subscription.

[1] *Settembre* v. *Putnam*, 30 Cal. 490; *Post* PARTNER; *Collins* v. *Case*, 1 M. R. 91.

5. When the paper was so handed, it was represented that the defendants who had subscribed were embarked in the enterprise, and that the prospects were flattering; that the sum necessary to purchase the lands, etc., would be $250,000, and subscriptions to that amount were required. * * *

7. When certain names had been secured to the list, articles of association, dated March 31, 1864, preparatory to forming a corporation, were signed; those who signed the articles acted as agents of all the subscribers for stock. At a meeting of the corporators, on the 21st of April, 1864, the stock was divided into 50,000 shares of $10 each. The purchase from Amos and Emmett Densmore of certain oil land, etc., (specifically mentioned) for $250,000, was approved, and the president and directors were authorized to carry it into effect. And it was resolved that the capital stock should consist of the property authorized to be purchased, with the improvements, they being valued at $500,000. The capital stock was directed to be issued free from further assessments. The corporators then elected directors and officers, and resolved that "the certificates be issued in favor of the original corporators as they may be entitled to the same, or to such parties as may appear to be entitled by allotment or subdivision of the said stock under the original corporators." At a meeting of the directors, on the 22d of April, 1864, Lawrence, one of the defendants, and secretary of the company, being present, a certificate required by the act of assembly was approved, sworn to, and ordered to be filed with the auditor-general, etc. The certificate set forth the capital as $500,000, divided into shares of ten dollars each, and that five dollars had been paid on each share. It was signed by Lawrence, as treasurer. There was on the minutes a statement of the allotment of the stock, and certificates were directed to be issued in conformity thereto. The statement exhibited stockholders for 50,000 shares, and payments to the amount of $250,000. Amongst others, Amos Densmore, Roudebush, Watson, Whitney, Lawrence and Hugel appeared as holding 25,500 shares.

8. At a meeting of the directors, May 3d, a deed from Amos and Emmett Densmore, dated April 25, 1864, was accepted, and at the same meeting, Lawrence reported that he had paid the purchase money.

9. The certificate to the auditor-general that five dollars had been paid on 50,000 shares was not true. It was untrue that Lawrence had paid the purchase money.

10. No money was paid by the Densmores, Watson, Roudebush, Whitney and Lawrence for the shares subscribed for by them.

11. Densmores, Roudebush, and Watson, the owners of the interests conveyed by the deed of April 25, 1864, were willing to take a sum much less than $250,000; that sum was fraudulently agreed amongst the defendants to be set up as the real price, and that subscriptions, which, with their own, would be sufficient to make that sum, should be obtained—those subscriptions were to pay $122,500 in cash, while the defendants would not pay anything. Whitney, Lawrence and Hugel, without paying any money, or having any interest in the land, divided amongst themselves $32,500.

12. At the date of the deed, several of the properties conveyed by it did not belong to the Densmores, Watson, Canfield and Roudebush, the grantors. They had given small sums for the properties which they did own. They had no right to make a profit at the expense of the other stockholders, and were bound to disclose all the circumstances. The Densmores, Watson and Roudebush, as corporators, acted as the agents for all the subscribers, and represented them as corporators. As such agents, they fraudulently bought for themselves both the rights they had acquired and those they expected to acquire, and charged a sum sufficient to cover what they had paid, and an enormous profit to themselves.

The prayers were—

1. For an account of the profits, etc.

2. For payment to the plaintiffs of five dollars for each of the 25,500 shares.

3. General relief.

The articles of association and receipt were as follows:

"Know all men by these presents, that we, Francis C. Lawrence, Jonathan Watson, Ira Canfield, Amos Densmore, Richard Levick, Adolph Hugel, Clinton Roudebush and Robert Smith, associate ourselves together under the articles of agreement made and entered into under the provisions of an act of the 18th day of July, A. D. 1863, entitled 'An Act

relating to corporations for mechanical, etc., purposes,' in order that we may be and remain a body corporate, under the name and style of the 'Densmore Oil Company,' for the purpose of mining for oil, and manufacturing, preparing, and transporting the same to market, and of enjoying all the rights and privileges conferred by the said act of assembly.

"It is further agreed that the mining and manufacturing business of the said company shall be carried on on certain tracts or leases of land situated along Oil Creek, Venango county and that the business of the said company shall be transacted at the office of the said company, in the city of Philadelphia, where the corporate meetings shall be held. That the capital stock of the said company shall be $500,000, to be divided into shares at the first meeting of the said company, to be held on Thursday, the 21st day of April, A. D. 1864, etc., for the purpose of organizing the same under the provisions of the aforesaid act of assembly, dividing the capital stock into shares, adopting by-laws for the regulation of the business of the corporation, to assess upon each share of stock such sum of money as the corporation may deem proper, etc.

"Witness our hands and seals this 31st day of March, A. D. 1864."

Signed by the persons named in the articles.

"Received of Francis C. Lawrence, treasurer of Densmore Oil Company, two hundred and fifty thousand dollars, in full of consideration of sale of oil rights and interests in real estate, in pursuance of contract of said company with Amos and Emmett Densmore. AMOS DENSMORE."

The Densmores and Roudebush, three of the defendants, answered to paragraphs—

3. In March, 1864, the above defendants and Canfield owned the oil lands, etc.; some had been so owned for more than three years, and the remainder for one year or more. No part had been purchased for the purpose of forming an oil company, or disposing of it to an oil company. Amos Densmore offered to sell this property to persons in Philadelphia, amongst whom were Lawrence and Hugel, and afterward Watson. As a result of negotiations, it was determined to form a stock company, based on the lands, etc., at a valuation

of $250,000, the capital to be divided into 50,000 shares at five dollars per share. Lawrence, Hugel and Watson were to manage the details of forming the company, perform the labor, and superintend the formation. The Densmore Oil Company was accordingly formed with 50,000 shares at ten dollars each, with five dollars per share paid in by the said properties. It was agreed, by the Densmores and Hugel, Lawrence and Watson, that the Densmores should sell to the oil company the lands, etc., for $250,000. This contract was afterward consummated by payment of the purchase-money and transfer of the property to the company. Before this time, before the execution of the agreement, and before the formation of the company, it was stipulated that the Densmores, Roudebush, and Canfield should receive $122,500 in cash, and 16,000 shares of stock, and that Whitney, Lawrence, Hugel and Watson should receive 9,500 shares.

After the articles of association, and before the final organization, 24,500 shares of stock had been sold to other persons by Lawrence, Hugel and Watson, without any participation by these defendants. Lawrence afterward paid $122,500 to Amos Densmore, who, after the organization, received 16,000 shares of stock. The valuation of the property was reasonable. A short time afterward $400,000 could have been got for it. These defendants had expended $100,000 in developing it, and in the machinery. The yield per day, at the time, was eighty barrels, worth five dollars per barrel. There was no fraud nor concealment of facts.

7. In executing the articles of association, these defendants acted for themselves as corporators, and not as agents for any subscribers to stock.

9. The certificate to the auditor-general was true. The object was not to form a company with a money capital, but one with the lands, oil interests, etc., referred to as the capital, at a valuation of $250,000. This was understood by all who became interested. Shortly after the organization, the stock sold at fifteen dollars per share.

10 and 11. There was no secret agreement between the parties named in these paragraphs. The sale was for $250,000, just in the manner that sum was paid.

12. These defendants and Canfield, at the time named in

this paragraph, were owners of all the property conveyed to the company. Watson had no actual interest in any of it, but held the legal title merely of some portions. There was no fraudulent profit or fraud of any kind. Neither these defendants nor Watson, as agents for the stockholders, bought any rights and charged their principals, as alleged in this paragraph. The persons mentioned as subscribers never claimed or were entitled to take part in the organization, they being purchasers only, under a contract to deliver stock to them when issued.

Watson, Hugel and Whitney each filed a separate answer, covering about the same ground as the answer of the other defendants. They especially averred that they had no interest in the lands, etc.; that, before any association was formed, they had been employed by the other defendants, who owned the lands, to dispose of them; that it was finally agreed that they should be sold for $250,000 to an association to be formed, the terms being that detailed in the answer of the other defendants.

A replication was filed, and an examiner appointed.

The plaintiffs examined Amos Densmore, one of the defendants. He testified that in February or March, 1864, he came to Philadelphia to dispose of the oil lands, etc.; saw Lawrence and Hugel, and offered to sell the property, not including that belonging to Roudebush and Canfield, for $150,000, if the amount of stock to be retained by Densmore, should a company be formed, could be agreed upon. Afterward, Canfield and Roudebush applied to Densmore to have their property sold with his, and he told Lawrence and Hugel that they could have the whole for $122,500 cash and 16,000 shares of stock in a company consisting of 50,000 shares. After some negotiation, it was arranged that a company should be formed with the property at $250,000 as the capital—the owners of the property to have cash and stock as above stated. Densmore received the $122,500 from Lawrence, and the deed was executed and delivered; $250,000 was a low price for the property, as such property was then selling. The stock was to be disposed of at five dollars per share. The vendors were to receive $122,500 in cash, the proceeds of sale of 24,500 shares, and 16,000 shares of stock. Lawrence, Hugel, Wat-

son and Whitney were to receive the remaining 9,500 shares for their services in forming the company and disposing of the stock.

The certificate to the auditor-general, given in evidence, recited the articles of agreement as above given, that the capital stock amounted to $500,000, divided into 50,000 shares of ten dollars each, and that five dollars per share had been paid in; that the company had been organized on the 21st of April, 1864; Aaron S. Lippincott elected president, James M. Crossman, Oswald Jackson, Joseph B. Altemus, John Potter, and Richard Levick, directors, and Francis C. Lawrence, treasurer. The certificate was signed by all these officers, except Levick, and sworn to by them, May 3, 1864. The subscription list, as recorded on the company's minutes, is that mentioned in the bill.

By the defendants' evidence, it appeared that none of the persons who took stock signed any subscription paper, but that they agreed verbally with Lawrence, Hugel, etc., generally with Lawrence, to take stock. It was sometimes placed on a list, sometimes noted on a slip of paper by Lawrence, etc. Lawrence and his associates did not subscribe for any stock, but the certificates, by the direction of Densmore, were issued directly to them. Whitney and Lawrence were partners as commission merchants; their reputation for getting up companies was very high. Oil properties of great value could not be disposed of in any other way than by forming a company. The Densmore properties were considered very productive and of very great value.

There was much other evidence. What is here given, and that stated in the opinion of the court, sufficiently exhibit the case.

Mr. Justice SHARSWOOD, at Nisi Prius, dismissed the bill, with costs.

The plaintiffs appealed, assigning the dismissal of the bill for error.

E. S. MILLER and STRONG, for appellants.

One who is vendor can not act as an agent for the purchaser:

Gould v. *Gould*, 36 Barb. 271; *Burton* v. *Wookey*, 6 Maddock Ch. R. 367. Persons acting in a confidential character can not purchase for themselves the property of those for whom they are acting: Sugden on Vendors, Chap. 20, Sec. 2; *Conkey* v. *Bond*, 34 Barb. 276; *Remick* v. *Butterfield*, 11 Foster (N. H.) 70; *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; *Whichcote* v. *Lawrence*, 3 Vesey, 750; *Michoud* v. *Girod*, 4 Howard, 555; *Ex parte Lacey*, 6 Vesey, 626; *Reed* v. *Warren*, 5 Paige Ch. R. 650; *Aberdeen Railway Co.* v. *Blaikie*, 1 Macqueen R. 461; *Kimmell* v. *Geeting*, 2 Grant, 128; *Hill* v. *Frazier*, 10 Harris, 320. A promoter of a company can not buy land which will be needed by them, and make profit on it: *Bank* v. *Tyrrell*, 5 Jurist (N. S.), 924; *Hichens* v. *Congreve*, 4 Russ. 574. Nor buy shares in a company at reduced rate: *Society* v. *Abbott*, 2 Beav. 559; *Beck* v. *Kantorowicz*, 3 Kay & Johns, 230; *Foss* v. *Harbottle*, 2 Hare, 488; *Frazer* v. *Jones*, 5 Ibid. 475; *Gaskell* v. *Chambers*, 26 Beav. 360; *McElhenny's Appeal*, 11 P. F. Smith, 188; *Simons* v. *Vulcan Oil Co.*, Ibid. 202. It would not be equitable to rescind the contract, for this would destroy the company. Relief, therefore, will be given in some other form: Lewin on Trusts, 468; *Bradley* v. *Bosley*, 1 Barb. Ch. R. 125; *Jones* v. *Shackleford*, 2 Bibb. 412; *Fisher* v. *Kay*, Ibid. 434; *Woodcock* v. *Bennet*, 1 Cowen, 711.

C. M. HUSBANDS and B. H. BREWSTER (with whom was W. L. HIRST), for appellees.

The owners, not having purchased the property for the use of the company, could sell for such price as they could get: *Bank of London* v. *Tyrrell*, 5 Jurist (N. S.), 927; *The Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586; *Foss* v. *Harbottle*, 2 Hare, 489; Lindley on Partnership, 481.

The opinion of the court was delivered January 10, 1870, by SHARSWOOD, J.

There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority.

The first is, that any man, or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentations made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were, in no sense, agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in *Foss* v. *Harbottle*, 2 Hare, 489, "A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how, or from whom, or at what price. I am willing to sell it at a certain price for a given purpose." This principle was recognized and applied by this court in the recent case of *McElhenny's Appeal* (*in re Hubert Oil Co.*, decided May 11, 1869), 11 P. F. Smith, 188. "It nowhere appears," said the present Chief Justice, "that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arm's length, as it seems he did." And again: "If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale." In that case, McElhenny, being the owner of property which had cost him only $4,000, sold it to Baird, Boyd & Co. and others, who associated with him to form an oil company, for $12,000, and it was decided that the company could not call him, in equity, to account for the profit he had made.

The second principle is, that where persons form such an as-

sociation, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership; one partner can not buy and sell to the partnership at a profit, nor, if a partnership is in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business, each associate is the general agent of the others, and he can not divest himself of that character without their knowledge and consent. This is the principle of *Hichens* v. *Congreve*, 4 Russ. 562; *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132, and the other cases which have been relied on by the appellants. It was recognized in *McElhenny's Appeal*, just cited; and also in *Simons* v. *Vulcan Oil Co.* (decided by this court May 11, 1869), 11 P. F. Smith, 202. Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case, delivered by THOMPSON, C. J., it is said: "If the defendants, in fact, acted as the agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If, in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company in ignorance of the true sums actually advanced." The defendants in that case were subscribers, with others, to the stock of a projected oil company, and after the plan had been formed, secured to themselves, by contract, the refusal of the property,

which they afterward sold to the company at a greatly advanced price.

The question now presented is, under which of these two principles is the present case to be classified? That will depend upon the facts, which, though the testimony is somewhat voluminous, may be briefly stated. Densmore, Roudebush, and Canfield, three of the defendants, were the owners of certain lands, leases and rights in Venango county, in the oil region. They had acquired them, so far as appears, with no idea of disposing of them, or of forming a company, but had spent over $100,000 in improving and developing them while they were owners. In March, 1864, they came to Philadelphia to ascertain whether they could be sold to advantage. They called upon Mr. Lawrence, another of the defendants, and consulted him as to the best mode of effecting this object. They stated that they were willing to accept $202,000, provided that sum could be procured clear of all expenses. That seemed impossible, unless by naming a price so much beyond that sum as would cover all such probable expenses and contingencies. The only mode by which so large an amount could be realized was by the organization of a stock company, and to do that effectively persons must be employed as agents to sell or solicit subscription to the stock; and they must be gentlemen of character and influence, well acquainted with the subject, who could bring the land to the notice of those desirous of engaging in such an enterprise. The amount to be raised was large; the result uncertain. Several agents must be employed, and their compensation must be at a liberal rate. It was arranged that the price should be fixed at $250,000; that the stock should be 50,000 shares at ten dollars a share, and five dollars to be paid in cash. Mr. Densmore and his associates agreed to take $122,500 in money, and the balance in stock, and that from this stock they would compensate the agents for their services. Mr. Densmore, who was examined as a witness on behalf of the appellants, testified: "The $122,500 was the proceeds of the sale of 24,500 shares. That, added to the 16,000 shares we were to get, amounted to 40,500 shares. The arrangement, as I understood it, was that Messrs. Lawrence, Hugel, Watson, and perhaps parties unknown to me, were to receive the

balance of the stock for their services in forming the company and disposing of the stock." The gentlemen named were accordingly engaged for this purpose. They proceeded and did sell the 24,500 shares, in order to make the cash payment. There was no subscription paper. Mr. Lawrence and his associates did not subscribe for any stock. They did not appear, and were not held out as subscribers to those who made purchases from them. It is true that, after the company was organized, the stock which they were to receive from Densmore, Roudebush, and Canfield, as a compensation for their services, was issued to them directly—not to the vendors—and by them transferred. But this was done by a special order as is satisfactorily explained in the testimony of E. B. Schneider: "I heard Mr. Densmore request Mr. Lawrence to have the Densmore stock, which he (Mr. Lawrence), Watson, Hugel, and Whitney were entitled to, issued direct to themselves, as he might not be here when the certificates would be ready." It has not been and can not be controverted that the stock which they received was part of that which, under the original terms of sale, Densmore, Roudebush, and Canfield were to have in payment of the purchase money.

Now, it can hardly be questioned, and indeed, apart from their alleged liability as confederates with the other defendants, it has not been questioned that Densmore, Roudebush, and Canfield fall within the first principle hereinbefore stated. They had for a considerable time been the owners of the property, had acquired it with no reference to the formation of this or any other company, and had improved and developed it by a very large outlay of their own capital. They had a clear and undoubted right to put their own price upon it in the formation of a company, in which they were to be partners or associates. They did put upon it the price of $250,000 which, it is admitted at the rates at which such property was then selling in the market, was a fair and reasonable, nay, even a low price. "From my knowledge of mining properties in the oil region at the time," said N. B. Browne, Esq., in his testimony, "and especially of the leasehold and other interests conveyed to this company, I regarded their interests at the price named, $250,000, as cheaper than any that were offered

in this market. Their actual productive value was very great. The leases were on what was regarded as the best territory on Oil Creek." Had Messrs. Densmore, Roudebush, and Canfield employed no agents, but sold all the stock themselves, the transaction as to them could not have been impeached. They certainly stood in no confidential relation to the subscribers or purchasers of the stock in the future, when they acquired the property. This is necessary, as we have seen. A company or partnership must have been then formed or forming, or, at least, the project must have been started, in order that any confidential relation should arise. How, then, is their position varied by the fact that they employed agents, and agreed to compensate these agents by a transfer of a certain part of the stock they were to receive? It is not easy to see. The whole $250,000, money and stock, when received, was their own absolute property: they could give or transfer it to whomsoever they pleased. If, as we have seen, they stood in no confidential relation to the company, no trust could attach to the price or any part of it in their hands. We may dismiss, therefore, the case of Messrs. Densmore, Roudebush, and Canfield, as clearly within the first principle to which we have before adverted.

But what confidential relation did the other defendants sustain to the purchasers of the stock or to the company? It is a clear and unquestionable fact in the cause that they did not subscribe for a single share. Their contract was with Densmore, Roudebush, and Canfield, to receive from them a part of their stock. Without an order from them, Mr. Lawrence and the others could not have compelled the company to issue any of it to them. If Densmore, Roudebush, and Canfield had received all the certificates to which they were entitled, and then refused to transfer, the only remedy of Messrs. Lawrence and others would have been against them to recover damages for violation of their contract. It is clearly proved that the paper among the exhibits, headed "Subscription List to the Densmore Oil Company," was made out by Mr. Lawrence, after the organization, as a list of those to whom certificates of stock were to be issued. The names of Lawrence, Whitney, Watson, and Hugel appeared on that list, but clearly only as appointees or assignees of Densmore, Roudebush,

and Canfield. The same appointment or order might have been given by them to mere strangers.

It is strenuously contended, however, that if these defendants did not stand in a confidential relation to the purchasers of stock, then there was nobody who stood in that relation. But is there anything extraordinary in that? Nine tenths of the transactions and contracts of life are at arm's length. If a man buys stock in the market of a broker, there is nobody who stands in any fiduciary relation to him. He acts on his own judgment. He is bound to pay the broker the price agreed, and the broker is bound, when paid, to deliver him the stock. This was the only relation in which Lawrence, Whitney, Hugel, and Watson stood to those who bought stock from them, and who, according to all the testimony in the cause, so understood it. They supposed, as they state, that these gentlemen were to receive compensation for their services. What it was to be they did not inquire, because it was none of their business.

A strong effort, however, has been made to show that these defendants, Lawrence, Whitney, Watson, and Hugel, were purchasers from Densmore, Roudebush, and Canfield, of an interest in the property, and sold it at an advance. But of this there is not a spark of evidence. It can hardly be pretended that Densmore, Roudebush, and Canfield could have held them liable on a contract to purchase any interest in the land, or that the agents could, in any event, have sued them for not conveying to them such interest. If this was so, how can it be contended that they were vendors of any part of the property to the company?

Densmore, Roudebush, and Canfield were, first and last, the only vendors. They executed the deed, and very properly receipted for the whole of the purchase money, for they were entitled to the whole of it. Nor is the fact that Lawrence, Whitney, Watson, and Hugel joined with Densmore, Roudebush, and Canfield as original corporators, and signed the articles for the organization of the company, under the Act of July 18, 1863 (Pamph. L. 1864, p. 1102), a fact of any significancy. That act does not require that the corporators should be subscribers to stock. They need have no interest whatever in the company to be formed. They are mere

instruments of the law for purposes of preliminary organization. The moment that is accomplished, the amount required as capital paid in, the necessary certificate signed, and the charter granted, they are *functi officio*. The corporation is thenceforth composed of the stockholders.

It is supposed that the cases of *McElhenny's Appeal*, and *Simons* v. *Vulcan Oil Co.*, before referred to, ought to rule this cause. But an examination of the opinions in those cases will show that the facts upon which they were decided were entirely different from those which appear on this record. The defendants there were subscribers to the stock. They became purchasers of the property after the project of a company was started, and, moreover, falsely represented that they had purchased it at the same price at which they sold.

These facts, which were the grounds upon which those determinations were based, are not, as we have seen, the facts of this case. It is not pretended that any false representation was made by any of these defendants in the sale of the stock. Some other points have been raised, which are, however, sufficiently disposed of in the opinion below.

Decree affirmed, and appeal dismissed at the costs of the appellants.

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[1] MERRICK v. PERU COAL CO.

(61 Illinois, 472. Supreme Court, 1871.)

[2] **Contracts of its members with the corporation.** A shareholder may deal with, sue and be sued by a corporation. If the president buy its paper he will succeed to the rights of the holders; or if he take up the indebtedness, he may maintain an action for money paid and expended for its use.

Advances by president. And for advances in aid of its purchases or business he can sue and recover money loaned.

Officers may deal with it as if strangers. When a corporation incurs a

[1] After a second trial this case came before the Supreme Court again, on writ of error, and is reported in 79 Ill. 113, as *Peru Co.* v. *Merrick*. The second decision, aside from certain points of practice, merely reaffirms the decision above reported in general terms and sustains the judgment in favor of Merrick.

[2] *Twin Lick Co.* v. *Marbury*, 3 M. R. 688.

legal liability to certain of its officers or shareholders, the private arrangements between such parties are of no more concern to the corporation than if they neither held stock in nor were officers of the company.

[1] **Arrangement between organizers as to their interests in the corporation—Advances.** Where two brothers, contemplating the organization of a corporation, purchased coal lands and mining rights, agreeing at the time to have an equal interest in the company and to make equal advances to it; and after the organization, one of them advanced various sums in paying its drafts and lifting its indebtedness, for which he received credit on the books of the company: *Held*, in action against the company for such sums, that the agreement was intended only to bind each brother to advance equal amounts as loans and not as donations; and even if this were not so, the company was no party to the agreement, could not set it up as a defense, and it could not affect its legal liability.

Equitable distribution between such organizers. If by recovery for advances, plaintiff should obtain an advantage over his brother, by getting more than his fair share of the corporate property, the brother might in equity under the contract, have the rights and burdens of each equalized.

[2] **Compensation to president for services.** Without special provision by law or resolution for payment for his services, the president of a mining corporation can not recover therefor.

Admissions of legal conclusions made in ignorance of a party's legal rights are not conclusive.

Appeal from the Circuit Court of La Salle County; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. T. LYLE DICKEY and Mr. JOHN C. CHAMPLIN, for the appellant.

Mr. SAMUEL W. FULLER and Mr. G. S. ELDRIDGE, for the appellee.

Mr. Justice WALKER delivered the opinion of the court.

This was an action of debt, brought by appellant, in the La Salle Circuit Court, against appellee, at the October term, 1869. The declaration contained several special and the common counts.

There was filed a plea of *nil debet* payment set-off, and a plea denying the execution of the notes and bills of exchange declared on, verified by affidavit.

At the June term, 1871, a jury was waived and the cause was submitted to the court for trial by consent of the parties.

[1] *Faulds* v. *Yates*, 3 M. R. 551.

[2] *Carr* v. *Chartiers Co*, 3 M. R. 476.

After hearing the evidence the court found the issues on all of the pleas except set-off, which had been withdrawn, for the defendant. A motion for a new trial was entered by plaintiff, but was overruled by the court.

Appellant introduced, after proving the signature, a note of appellee, dated October 2, 1867, signed C. C. Merrick, president of the company, payable in six months, for $3,290, payable to the Michigan Car Company, and indorsed to appellant by the payee; also a note of appellee dated the 7th of October, 1868, for $2,239.43, payable at 60 days to the Ohio Falls Car and Locomotive Company, signed by Geo. C. Merrick, president. A note of the same kind, same amount and date, payable 90 days after date, with assignments and a receipt of payment of both of these notes by appellant; also two drafts drawn by C. C. Merrick, president, in favor of the Michigan Car Company, one dated July 1, 1867, for $4,920, and the other dated January 4, 1868, for $5,166, both assigned in blank by the payee.

Appellant testified that he took up the notes to the Ohio Falls Car Company, each for $2,239.43, with his own private funds, one December 10, 1868, and the other, January 9, 1869; that he took up the two drafts in the same manner, also other items of account amounting in the aggregate to $30,580.84, after deducting all credits; that these sums were advanced from his own moneys, and the same were paid either to, or for and on account of the company, with the knowledge and approbation of the president thereof; that in December, 1868, and January, 1869, the company purchased cars, and its paper was given therefor, which had matured, and the company having no funds, and appellant being the president, took up the paper with his own means, and caused the amount to be entered to his credit on the books of the company.

Appellant further produced vouchers for the items of his account, and swore to their correctness; and appellee's counsel says that it was not denied, so far as he remembers, that appellant had made most of the payments and performed most of the labor for which he claimed to recover of appellee, but he says the sole question was, whether the payments were made and the labor performed on the credit of the company, and for which it became liable as his debtor, or whether they were made in pursuance of the original agreement between

him and his brother for the purchase and operation of the property of the company.

It appears that in December, 1865, appellant and his brother Charles purchased of T. D. Brewster and E. Higgins certain coal land and mining rights in the city of Peru in this State, which had belonged to an insolvent mining company known as the Peru Coal Mining Company, which was then in the hands of, and operated by Brewster and Higgins, and who claimed to be the principal owners thereof. The terms of the purchase were, that the Merricks were to give $30,600, and to form a new corporation under the general laws of the State with a capital stock of $1,000,000, and Brewster and Higgins were to have $\frac{49}{100}$ of the full paid stock, thus leaving the Merricks owners of a small majority of the stock, giving them the control in the management of the affairs of the company.

The $30,600 was paid pursuant to the agreement, a new corporation was formed in February, 1866, and the stock issued to the parties pursuant to the agreement. The coal lands were conveyed to them, and not to the company, and were so held by them for more than a year, when they were conveyed to the new company.

The Merricks seem to have taken into their hands the full management of the affairs of the company. Charles was elected president of the company, and held the office for two years when he was succeeded by appellant. He occupied the position until February, 1869, when Charles was re-elected to the place. They, with Brewster, were the directors of the company.

At the time of the sale Brewster and Higgins owned the large portion of the stock of the old company, but there were quite a number of shares held by other persons. This outstanding stock, it was subsequently agreed by the Merricks, should be purchased in by Brewster on their account, as far as it could be conveniently done; and the greater portion was thus obtained.

It was understood and agreed between appellant and Charles, when the purchase was made, that they were to have an equal interest in the stock of the company, and to make equal payments on account of the property purchased, and

that they would advance the necessary means in equal parts for carrying on the business of the company; and they seem to have had the same understanding in buying the outside stock, which was purchased for them in equal amounts.

On the 8th of April, 1867, a meeting was held, and the stockholders accepted a special charter granted by the legislature, and in pursuance of its provisions, the capital stock was then increased to $500,000. The stock was issued for that amount. Charles previously held 482 shares, appellant 482 shares, Brewster 32 shares and 4 were unrepresented when the increase of the stock was made. On the 30th of December, 1867, Charles held 2420, appellant 2420, Brewster 108, Kales, 50, and 2 shares were not issued, making in all, 5,000 shares. The new stock was issued on the old, four new shares to each one of the old; no money was paid therefor.

An arrangement was entered into between Charles and appellant, as we have seen, before the purchase was made in the first instance, that, as the corporation would be compelled to have money and credit to develop and carry on the enterprise, they were each to advance to the corporation the money for that purpose, and as between themselves they would equalize the advances thus made. The meaning and effect of this arrangement gives rise to this entire controversy. Appellee contends that, under it, neither of the brothers could make the company liable, nor could it become the debtor of either of them. On the other hand, appellant contends that, as the corporation would be compelled to borrow money to a considerable extent, they would advance or loan to it the necessary funds in equal amounts, and as between themselves equalize that amount if one of them should advance more than the other.

As we understand the case, this arrangement was entered into when they owned but a small majority of the stock, and when others, to whom they were under neither any pecuniary nor moral obligation, held almost one half of the stock. It is true that they subsequently became the owners of all but a trifling amount of the stock of the company, but such was not the case when the arrangement was consummated. When this, together with other circumstances which surround this agreement, are considered, they repel, in the strongest manner

the presumption that the parties intended to advance such large sums of money to a corporation nearly one half of the stock of which belonged to others, and thus give near one half of the benefits derived therefrom in the shape of property and profits to other persons. It looks to us as being almost impossible that such could have been the design. Men are rarely so disregardful of their interest.

On the contrary, if these brothers expected to make the stock of the company valuable, it was natural that they would be willing to loan means to the company from any surplus they had, look to it for repayment, and thus increase their interest in the property and profits of the company. If such was the design, and it is but reasonable to believe it was, then a motive reasonable and fully sufficient to induce such action on their part, is found. Had they, in the beginning, and when the arrangement was entered into, been the sole owners of the entire stock, then we could see that it would be a matter of indifference, on advancing money by either of them to the company, whether it should be charged to the company or one half thus advanced charged to the other as by either mode the result to their interest would have been the same. In such a case, all of the benefits would have inured equally to each of them, and other parties could not have shared in them.

For these reasons, we are of the opinion that the arrangement must have been intended only to bind each to advance equal amounts to the corporation as loans, and not as donations.

The evidence does not show that any other or different arrangement was afterward made, when they had obtained all but a few shares of the stock, and we will not presume that they intended that the advances then made should be on other or different terms.

But even if such is not the purport of the agreement, and it is as claimed by appellee, does it follow that such an agreement can be interposed as a defense to this action?

Here is a corporate body having a legal existence, endowed with ample powers to enter into contracts and agreements, of suing and being sued, which has given notes and drafts to persons in nowise connected with it or its organization, and had given notes and drafts which were undeniably binding on it in

law—such instruments as the payees and drawees could, beyond all doubt, have sued upon and recovered after their maturity. So could their assignees. And it may be asked why appellant could not recover, when he, in his own individual right, with his private means, purchased these instruments so far as we can see, in good faith, or, at all events, paid with his individual funds, for the use and benefit of the company. It will not be said that he could not recover because he was a stockholder and officer of the company, as both have the right to deal with the company in the same manner as strangers may; and when they do so each party acquires the same rights and incurs the same liability as would strangers.

There is no rule of law which prohibits a shareholder from dealing with the company, or from suing or being sued by it. It then follows that appellant, notwithstanding he was the president of the company, had the right with his own funds, to purchase these notes and drafts, and when he did so he succeeded to all of the rights of the holders. Or he, upon taking up, with his own means, such indebtedness, had the right to maintain an action for money paid, laid out and expended for the use of appellee.

It is equally true, that, if he advanced money to the company to enable it to carry on its business, he can sue it and recover for money loaned. Having the right to deal with the company, he had power to loan it money and to look to it for payment. Such is the well recognized law, and it must control unless prevented by the agreement of C. C. Merrick and appellant, entered into when they first purchased the property.

Whatever may be the rights of these parties, as individuals or as partners, in forming the company as they did, we are wholly unable to see that appellee can invoke the private agreement of the Merricks to release it from liabilities it has legally incurred and has never discharged. The company was not a party to that agreement, and has no more concern with it than if it had been entered into by persons who neither held stock in, nor were officers of the company.

We can alone look to the liabilities of the company, and not to the equities that may exist between appellant and his brother. The corporation, according to the usual course of

business, incurred the liability to pay this indebtedness, and has done no act to discharge it from that burthen. It has no right to insist upon the performance of an agreement entered into by two of the shareholders in reference to the terms and conditions that they should purchase and hold stock and loan money to the company. That was their private affair, which in nowise concerned the company.

We must not forget that the company is a separate legal entity existing independently of the Merricks, although they may have owned much the greater portion of the stock. It is fully illustrated when appellant ceased to be the president and a director in the company. Although he owned nearly one half of the stock, he was as impotent to control its acts as a stranger owning none of its stock.

Appellant and his brother, had they owned all of the stock, would not have been the company but would have represented its stock, and would have held the power, by virtue thereof, to designate the persons who should exercise the franchises and powers of the company. They might, no doubt, by the adoption of by-laws, have conferred the power on themselves necessary for its corporate action, but they could not exercise them merely because they were stockholders.

If, by a recovery of a judgment for his advances, appellant would obtain an equitable advantage of Charles by obtaining more than a fair share of the corporate property, under their agreement that they should contribute equally and share equally in the stock and dividends of the company, then he has, no doubt, the right in equity to have their agreement strictly performed, and their rights and burthens equalized. But those rights can not be adjusted in this proceeding, nor can appellee call upon them to adjust those rights in a suit at law.

It is urged that appellant repeatedly said that the company owed him nothing, or that it owed nothing. From the whole of the evidence in the case, we are of the opinion that these declarations were all made when he supposed that he was compelled to look to his brother for the sum he had advanced in excess of that contributed by him, and under the supposition that he had no power to recover from the company. It is not pretended that he ever admitted that the money advanced by him to and for the company had been paid to him.

It is manifest that he made these statements and admissions in ignorance of his legal rights, and, from the evidence, we see nothing that should be held to conclude him from asserting them in this suit.

As to the claim for salary whilst acting as president of the company, we can see no right of recovery. It nowhere appears in evidence that there was any by-law or resolution of the company providing compensation for such services.

In the case of *Am. Cent. R. R. Co.* v. *Miles*, 52 Ill. 174, we held that in the absence of such a by-law or resolution, such compensation could not be recovered for services rendered by a director of a railway company. In principle, no distinction is perceived between the two cases.

All the evidence considered, we are of the opinion that the court below erred in finding the issue for, and rendering judgment in favor of appellee, and the judgment is reversed and the cause remanded.

Judgment reversed.

BASSHOR ET AL. v. DRESSEL

(34 Maryland, 503. Court of Appeals, 1871.)

[1] **Defective organization cured by legislative act.** Certain persons filed the proper certificate so as to become incorporate under the name of "The Baltimore Chrome Mining and Manufacturing Company." Subsequently its charter was amended by special act of the legislature. The validity of the charter was attacked on the ground of its attempted combination of mining and manufacturing, but it was *held* that the passage of the special act and the acceptance thereof removed defects, if any existed in the original incorporation, and made the corporation valid, *ab initio*.

Stock, paid up, in leasehold. The provision of the code allowing *lands* to be taken in payment for stock of mining corporations does not authorize *leasehold interests* to be so taken, so as to exempt stockholders from personal liability.

Appeal from the Superior Court of Baltimore City.

This was an action brought by the appellants, creditors of a corporation, known as "The Baltimore Chrome Mining

[1] *Kanawha Co.* v. *Kanawha Co.*, 7 Bl. C. C. R. 391; *Cowell* v. *Colorado Springs Co.*, 8 Colo. 82.

and Manufacturing Company," against the appellee, a stockholder therein, to charge him for the debt due by the company under the provisions of section 52, of article 26, of the Code of Public General Laws.

Judgment was rendered for the defendant, and the plaintiffs appealed.

The cause was argued before STEWART, MAULSBY, GRASON, MILLER and ALVEY, JJ.

THOMAS ROWLAND and JOHN THOMSON MASON, for the appellants.

The court below erred in instructing the jury that there was no legal evidence of the incorporation of the Baltimore Chrome Mining and Manufacturing Company, and the plaintiffs were, therefore, not entitled to recover in this action.

The certificate of incorporation is not defective. It contains all the requisites prescribed by section 40, of Article 26, of the code, as necessary to constitute a manufacturing corporation. It was in this character that the company dealt with the plaintiffs. Whatever more the certificate contained may be rejected as surplusage: Code of Pub. Gen'l Laws, Art. 26, sec. 40; *Eastern Plank Road Co.* v. *Vaughan*, 14 New York, 546.

There is no reason why the business of mining and manufacturing should not be carried on by the same company. The code does not prohibit it, but rather, by implication, permits it. In fact every mining company does do a manufacturing business in preparing its ores for the market. It was only to this extent that the company in question proposed to engage in manufacturing. The difference between the "mining of chrome ores" and the "manufacturing of bichromates and other salts," is not nearly so great as that between different kinds of manufacturing. If these two operations should require the formation of two different companies, it would be difficult to define exactly where the operations of the mining company should terminate, and those of the manufacturing company should begin: Code, Art. 26, Secs. 40, 68; *Neale* v. *The Vestry of St. Paul's Church*, 8 Gill. 116; *Bird* v. *Daggett*, 97 Mass. 494.

A substantial compliance with the reqnirements of section 40 is sufficient; even if those provisions are not to be considered as directory rather than fundamental: Angell & Ames on Corporations, Sec. 92; Abbot's Digest of the Law of Corporations, 24; *Eakright* v. *Logansport and N. I. R. R. Co.*, 13 Ind. 404; *Rogers* v. *Danby Un. Soc.*, 19 Vt. 187; *Mead* v. *Keeler*, 24 Barbour, 24; *Spring Valley Water Works* v. *San Francisco*, 22 Cal. 440; *Hawes* v. *A. S. Petroleum Co.*, 101 Mass. 394; *Merrick* v. *R. E. & G. Co.*, 101 Mass. 381; Gen. Stats. of Mass. (1860) ch. 61, secs. 1, 8; *State* v. *Brown*, 31 N. J. (Law) 357.

If there has been a *user* of a corporate franchise by an association of persons, their existence as a corporation can only be inquired into by the State, it can not be questioned in a collateral proceeding: Angell & Ames on Corporations, Sec. 94, 635; *M. E. U. Church* v. *Pickett*, 19 N. Y. 482; *Buffalo & A. R. R. Co.* v. *Cary*, 26 N. Y. 75; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Abbott* v. *Aspinwall*, 26 Barb. 202; *Cochran* v. *Arnold*, 58 Penn. 399; *Tarbell* v. *Page*, 24 Ill. 46; *Baker* v. *Adm'r of Backus*, 32 Ill. 81; *State* v. *Brown*, 31 N. J. (Law) 357.

One who has participated in the acts of user of a corporation *de facto*, subscribed to its capital stock and acted as an officer of the corporation, is estopped from denying that it has ever existed.

A creditor dealing with a corporation formed under the provisions of Article 26, looks to the individual as well as the corporate liability. To permit a stockholder and officer of a company holding itself out to the world as a corporation formed under the provisions of Article 26, to contract debts in its behalf, and then repudiate them because of some formal defect *in his own certificate* would seem to be utterly inconsistent with any reasonable idea of justice. It is certainly a violation of those principles of truth and equity which have given rise to the doctrine of estoppel *in pais:* Angell & Ames on Corporations, Secs. 94, 611, 630a, 635; *Abbott* v. *Aspinwall*, 26 Barb. 202; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Mead* v. *Keeler*, 24 Barb. 20; *Callender* v. *P. & H. R. R. Co.*, 11 Ohio, 516; *West Winsted Association* v. *Ford*, 27 Conn. 289; *Tarbell* v. *Page*, 24 Illinois, 46; *Mc-*

Hose v. *Wheeler*, 45 Penn. 32; *Smith* v. *Heidlecker*, 39 Mo. 162; *Dooley* v. *Cheshire Glass Co.*, 15 Gray, 494; *McDougall* v. *Lane*, 18 Ga. 444; *Neal* v. *Vestry of St. Paul's Church*, 8 Gill. 116, 119.

According to the true construction of Article 26, this company would not have attained a full corporate character, in any event, until the requirements of section 52 were complied with. Until the capital stock is fully paid up, the liability of the stockholders is that of partners at common law, except so far as it is modified and limited by the statute; and is not dependent upon the validity of the incorporation: Angell & Ames on Corporations, sec. 611; *Matthews* v. *Albert*, 24 Md. 535, 537; *Corning* v. *McCullough*, 1 N. Y. 47, 53, 60; *Moss* v. *Oakley*, 2 Hill. 265, 269; *Abbott* v. *Aspinwall*, 26 Barb. 207; *Conant* v. *Van Schaick*, 24 Barb. 87, 96; *Hawthorne* v. *Calef*, 2 Wall. 22; *Paine* v. *Stewart*, 33 Conn. 529.

CHARLES MARSHALL, for the appellee.

It is competent for a party when sued as a stockholder of an alleged corporation, to deny its legal existence. The liability is one created by statute, and exists only as to stockholders of a corporation created according to law.

Upon principle, there should be no estoppel, because the denial of the validity of the Act of incorporation works no wrong to the creditor, inasmuch as the liability of the defendant, in case the corporation had no existence, is unlimited, whereas if he be a stockholder of a legal corporation, his liability is limited to the amount of his stock. The defendant may contest the existence of the corporation, for the neglect or violation of any condition precedent to a valid corporate existence, or because there is no warrant in the law for the creation of such a corporation: *Utley* v. *Union Tool Company*, 11 Gray, 140; *Franklin Fire Ins. Co.* v. *Hart*, 31 Md. 59; *Frostburg Coal Co.* v. *Frost*, 24 How. 283; *Harris* v. *McGregor*, 29 Cal. 126; *Spencer, Field & Co.* v. *Paul Cook*, 16 La. An. 153; *Crocker* v. *Crane*, 21 Wend. 220; *Mokelumne Hill M. Co.* v. *Woodbury*, 14 Cal. 424; *Dauchy* v. *Brown*, 24 Vermont, 197; 1 Redfield on Railways, 64, Ch. 14, Section 18.

The proof in this case shows that there never was a legal corporation known as "The Baltimore Chrome Mining and Manufacturing Company."

The Code, Article 26, section 40 to section 67, inclusive, provides for the incorporation of manufacturing companies, and sections 68 to 87 inclusive, of the same article, provide for the incorporation of mining companies. The certificate offered in evidence purports to combine in one corporation both a manufacturing and a mining company.

There is no provision in the code which permits such an amalgamation of the two kinds of corporations; on the contrary, it will be seen upon examination of the powers and duties of each, that they are repugnant and inconsistent in many essential particulars. The act of 1868, ch. 481, sections 35 and 36, provide for the incorporation of companies for two or more of the purposes named in the act, and for the amalgamation of two or more of these companies after incorporation. The absence of such a provision in the law under which the corporation in question was attempted to be formed, becomes for this reason very significant. Without authority of law it was as much beyond the power of the parties to unite two statutory corporations in one, as it would have been to incorporate a company for a single purpose not permitted by the law: Angell & Ames on Corporations, sec. 111; 1 Redfield on Railways, ch. 4, sec. 18, p. 64.

Two existing legal corporations can not amalgamate so as to form a single corporation combining the purposes of both, even with the consent of every stockholder, without express legal sanction: *State* v. *Bailey*, 16 Ind. 46. If this be true, an amalgamation of corporations formed under special laws must have express legislative sanction.

The differences between the two kinds of corporations, which a brief examination of the powers conferred upon each, and denied to each, would disclose, show conclusively that the attempt to amalgamate, not only was *without legal authority*, but that it was *contrary to law*.

The proof of the fact of a legal incorporation in this case was radically defective, and did not show the existence of any corporation recognized by law. If this be correct, there can be no statutory liability.

MILLER, J., delivered the opinion of the court.

This is another case where creditors of a corporation are seeking to enforce, as against a stockholder, the personal liability imposed by section 52, of article 26, of the Code. None of the questions determined in *Norris* v. *Johnson*, and *Norris* v. *Wrenschall*, arise here. The case was concluded in the court below by an instruction to the jury that there was no legal evidence of the incorporation of the company of which the defendant is sought to be charged as a stockholder, and the plaintiffs are not, therefore, entitled to recover in this action, and whether this instruction be correct is the main question in this case.

The certificate of incorporation, dated the 11th of October, 1866, professes on its face to form a company for the purpose of mining chrome ores and manufacturing bichromates and other salts, under the name of "The Baltimore Chrome Mining and Manufacturing Company," and provides that the mining operations of the company shall be conducted in Harford county and other counties of the State, and its manufacturing operations and generally all the business of the company shall be conducted in the city of Baltimore in which its office for the transaction of business will be situated. On the part of the appellee, it is contended that this is an attempt to create a company, both for mining and manufacturing purposes, for which no provision is made by the code; that these several kinds of corporations are provided for by different sections, are in many essential features totally dissimilar, and parties have no power without legislative sanction to amalgamate the two in one certificate; that this is a radical defect in the organization of this company, just as fatal to its corporate existence as if the attempt had been to incorporate it for a purpose not permitted by law; that the right of recovery against a stockholder depends upon the fact that the plaintiff was a creditor of the corporation of which the defendant was at the time a stockholder, and hence the plaintiff must show the existence of the corporation of which he became a creditor; and that on this issue it is competent for the defendant to contest the legal existence of the corporation by reason of neglect or violation of any condition precedent

to a valid corporate existence, or because there is no warrant in the law for the creation of such a corporation.

On the other hand, the appellants insist: *first*, that there is no defect in the certificate, that it contains all the prescribed requisites necessary to constitute a manufacturing corporation, and whatever more there is in it may be rejected as surplusage especially in view of the facts that the certificate was recorded in Baltimore city only, and no attempt made to organize a mining company by having it recorded in Harford county, or elsewhere; that the corporation did carry on a manufacturing business in the city of Baltimore, for at least a year and a half, and its debt to the appellants for machinery to be used in that business was there contracted; *secondly*, that where there has been such user of corporate franchises by an association of individuals, their existence as a corporation can only be inquired into by the State, and can not be questioned in a collateral proceeding like the present between a creditor and a stockholder; and *thirdly*, that the appellee, who was one of the originators of the company, a subscriber to its stock, a signer of the certificate of incorporation; and who acted as one of its directors from its organization until it stopped business, and was present at the meeting of the board at which the settlement of the appellants' claim was unanimously authorized, is estopped by these acts of active participation in the user of a corporation *de facto*, from denying it had ever existed, and to permit him now to repudiate the existence of the corporation which he was thus instrumental in creating, conducting and holding out to the world as a corporation and capable of contracting debts as such, and escape the liability of a stockholder therein, would be inconsistent with any reasonable idea of justice and in violation of those principles of truth and equity on which the doctrine of estoppels *in pais* is founded.

These conflicting views have been strongly urged in argument, and a large number of authorities cited and pressed upon our attention, but we are relieved from the duty of expressing any opinion upon them, because in our judgment, this case does not rest upon the positions stated by the appellants' counsel. We are convinced that any defects, whether vital or formal, that may have existed in the original certificate of incorporation, because of its attempted combination of

a mining with a manufacturing company, have been cured by competent authority. The record shows that the defendant offered in evidence the minutes of proceedings of this company contained in a book which it was agreed should be used in this court, and as we understand the offer, it embraces all the proceedings in that book that are relevant to the matters in controversy between the parties to this suit. An examination of that book has disclosed the facts that the company applied to the legislature for an amendment of its charter, and a special law (Act of 1867, ch. 382) for that purpose was passed, which, on motion of the appellee, was accepted, and is set out in full on the minutes of proceeding.

The law entitled "An act to amend the charter of the Baltimore Chrome Mining and Manufacturing Company, by empowering the said company to increase its capital stock, or to make calls or assessments upon the present capital stock," amongst other things, empowers that corporation to increase its capital stock to the sum of $750,000, and if that shall not be done, then to make calls or assessments upon its present capital stock to the amount of $1 on each share. We regard this act as a legislative recognition of the validity of the existing corporation, and as having the effect to cure the defect, if any such existed, in the original certificate, of combining the two kinds of corporations in one charter. By accepting this act, the corporation, as to any such defect, became valid *ab initio*, as much so as if incorporated under the law of 1868, ch. 471, section 35. With the proof of this law and its acceptance in the case, there was error in the instruction granted by the court, and for this reason the judgment must be reversed.

The only other question material to be considered is, whether there is any sufficient evidence to authorize the jury to find that the capital stock had all been paid up. The certificate fixes the capital stock at $500,000, divided into one hundred thousand shares of $5 each. In reference to manufacturing corporations, the law provides that nothing but money shall be considered as payment of any part of the capital stock.

There is no proof and no pretense that this provision has been complied with. In the case of mining corporations, the law allows lands, as well as money, to be considered as pay-

ment, but that does not authorize leasehold interests, of which the greater part of this property consisted, to be considered as payment in full of the capital stock, so as to exempt the stockholders from personal liability under section 52. And even if all the property had consisted of fee simple estates in lands, we should be very unwilling to decide that such property, whose actual value, ascertained beforehand by public sale, was certainly less than $50,000, could, by any arrangement or agreement between the stockholders, be taken to be worth $500,000, so as to constitute payment in full, under this section of stock to that amount. We are fully satisfied there is no proof in this record of compliance with the statutory provision, by observance of which, exemption from personal liability is secured to the stockholders.

These views dispose of all the material questions that will probably arise in the further progress of this case, and we are therefore relieved from the necessity of deciding in detail, upon the large number of prayers offered by the appellants and rejected by the court.

Judgment reversed and new trial awarded.

(Decided 20th of June, 1871.)

BAILEY v. THE PITTSBURG AND CONNELLSVILLE GAS, COAL AND COKE CO.

(69 Pennsylvania, 334. Supreme Court, 1871.)

Relation of prior agreement of organizers to subsequent stockholders —Paying up capital with land. B., H. and S. were promoters of an association, under the act of July 18, 1863 (mining corporations), with a capital of $200,000. F. and M. united with them; afterward, September 29th, coal land was purchased by B., H. and S. for $125,000. A subscription book for stock was opened about October 1st; B., H. and S. subscribed for stock to the extent of $50,000; the subscription of the others, with a sixth name, amounted to $133,000, which B., H. and S. certified under the act had been paid in. The land was taken by the company; afterward subscriptions were made by other persons. In a suit by the company, against B. for his subscription, he alleged that the company, about October 1st, had agreed to take the land at an advance of $50,000, to be paid in stock, subject to the whole purchase money,

and that his interest in the land, by the authority of the then corporators, was appropriated to pay his stock. *Held*, that such an agreement for the advance was no defense as against subsequent stockholders not apprised of the facts at the time of their subscription. *Held*, further, that such arrangement was not a valid payment of the stock, and that the act contemplated payment in money.

Error to the Court of Common Pleas of Allegheny County.

This was an action of debt by the Pittsburg and Connellsville Gas, Coal and Coke Company, against James M. Bailey, for his subscription to 150 shares of the capital stock of the plaintiffs at $100 per share. The plaintiffs were incorporated under the act of July 18, 1863. Pamph. L. 1864, p. 1102; Purd. 1347.

On the trial the plaintiff gave in evidence:

"The Subscription Book of Stock, Oct., 1864.

Pittsburg and Connellsville Gas, Coal and Coke Company.

Capital stock, $200,000. 2,000 shares $100 each.

Directors: W. M. Faber, J. Meskimen, S. H. Hartman, J. P. Henderson, and James M. Bailey.

1864. We, the undersigned, do hereby subscribe for the number of shares set opposite our names, of the capital stock of the Pittsburg and Connellsville Gas, Coal and Coke Company."

Names.	Number of Shares.	Amount.
S. H. Hartman.....	190	
J. Meskimen.....	290	
D. R. Davidson.....	250	
James M. Bailey.....	150	
Wm. M. Faber.....	290	
J. P. Henderson.....	160	

(14 other subscribers, for 250 shares.)

The plaintiffs rested.

The defendant gave in evidence three certificates, dated November 7, 1864, to him for 50 shares each, of the capital stock of the company, and proved by J. P. Henderson, treasurer, that they had been issued in pursuance of an order of the board of directors.

On cross-examination, Henderson said: "No money was paid for this stock; it was paid in land about the time of the organization in September or October, 1864"; the same land paid for subscriptions of witness and S. H. Hartman, to whom

certificates were issued in the same manner by order of the directors. The land had been bought from D. R. Davidson by defendant and the witness; he was the only one in the written contract; he paid no money on the land.

Being re-examined, he said: "The company went into possession of the land at the time. When the stock was subscribed, it was agreed it should be paid in land. This was the agreement of all the five stockholders of the company."

The defendant rested.

The plaintiff in rebuttal gave in evidence the certificate duly recorded November 3, 1864, of the formation of the company. It certified that the amount of the capital stock was $200,000 in shares of $100 each, that $133,000 of the stock had already been paid in; that it had been organized by the election of five directors. The certificate was signed and sworn to, October 26, 1864, by Bailey and Henderson, as president and treasurer, and also by them and S. H. Hartman, as directors. This was accompanied by the proper certificate from the secretary of the commonwealth.

They gave in evidence also the affidavit of defense made by the defendant, that he had fully paid his subscription by a sale to the plaintiffs of his interest in a tract of land bought from D. R. Davidson, which was accepted by the company as payment of his subscription, and that he owed them nothing.

Also an agreement between Davidson and Henderson dated September 29, 1864, by which Davidson agreed to convey to Henderson his farm in Connellsville township, Fayette county, for $125,000, payable $25,000 in hand, and $20,000 annually, thereafter, till the whole should be paid, Davidson to have the use of the surface except so much as might be necessary to carry on the coke and coal business till the first payment should be made. They gave in evidence also other agreements about the property conveyed to the company, not necessary to specify.

J. P. Henderson, called by the plaintiffs, testified that $133,000 sworn to as paid in, meant the land. Davidson never subscribed or paid anything; he was to take $25,000 as part payment for the land.

Under objection and exception the plaintiffs proved by a number of stockholders, that after the subscriptions of the de-

fendant and his co-corporators, they had subscribed for stock, and paid cash and had never heard of the other stock having been paid in land.

J. Meskimen testified that he and Faber being in the coke business, and needing more capital, had agreed with defendants, Hartman and Henderson, after several meetings, to form a company; the property of witness and Faber to be taken by the company at a schedule price agreed on, witness and Faber to take $58,000 in the stock. This was about October 1st, when the company took possession of their property. Faber opposed the purchase of the Davidson property. The defendant, Henderson, and witness went to see Davidson, who agreed to sell it for $125,000, "and made an article that night." It was not suggested that defendant, Henderson, and Hartman were to pay their subscription in the Davidson land. Witness never heard that the land was to be put in at $175,000.

They proved by Davidson that he had not signed the subscription book, nor authorized any one to sign for him.

They gave in evidence an agreement, dated October 1, 1864, between Meskimen and Faber of the one part, and the plaintiffs of the other part, by which Meskimen and Faber conveyed their property to the plaintiffs, specifying it, in consideration of which the plaintiffs agreed to issue to Meskimen and Faber $58,000 of the stock of the company, and to pay a mortgage of $8,490 on the property conveyed, and a note of $3,000. This agreement was executed before Meskimen's and Faber's subscription to the stock was taken, the plaintiffs' company being then composed of the defendant, Henderson and Hartman.

The defendant in answer gave evidence by Henderson that the Davidson land was purchased by him, for himself, Hartman and the defendant. The terms of sale to the plaintiffs were, that the company should pay to the three $175,000 for the land, of which $50.000 was to be in stock; the balance was to be assumed by the company. The agreement was made the latter part of September, 1864, shortly after the agreement with Davidson. It had been filed with the company, and the witness assigned it in 1867, after he had ceased to be a member. The stockholders of the company were defendant, Hartman,

Meskimen, Faber and witness; the proposition to take the Davidson farm first came from the corporators, and was approved by them; after these transactions other persons became stockholders; all the directors assented to the payment of the stock in the Davidson land; the price was a fair and reasonable price.

S. H. Hartman testified substantially as Henderson, and also that he had paid nothing for the Davidson land, nor for the stock.

The defendant also testified on cross-examination that he had never paid anything on the land or for his stock.

There was evidence in rejoinder by the plaintiffs in answer to the defendants.

The defendant submitted points, on which he asked the court to charge, and which with their answers will be found in the assignments of error.

The verdict was for the plaintiffs for $19,975.

The defendant took a writ of error, and assigned for error:

1. The court erred in refusing to charge as requested in defendant's third point.

"That as between a corporation like the plaintiffs and the individuals establishing said corporation, the latter may sell and transfer unto such company an interest in real estate, and receive in payment therefor stock of the company, provided that said sale be not induced by any fraud or misrepresentations; that, in the present instance, if the jury believe that the defendant associated himself with Meskimen, Faber, Hartman and Henderson, to form the company plaintiff; that by mutual consent, Meskimen and Faber put their property into the company at an agreed valuation, and received payment therefor in stock of the company; that the defendants, Hartman and Henderson, put their interest in the Davidson tract into the company at an agreed valuation, and received payment therefor in stock of the company; that the said five persons, to wit: Meskimen, Faber, Hartman, Henderson and the defendant, composed the entire body of corporators at the time, then the jury should find for the defendant"; and in charging the jury:

"Admitting the arrangement set up by the defendant, that his subscription was agreed between himself, Hartman, Henderson, Faber and Meskimen, to be considered paid by the esti-

mated increased valuation of the land purchased from Davidson to be true, it would be no defense as against subsequent stockholders, who had paid their subscriptions to the capital stock of the company, unless they were cognizant of the transaction before they subscribed, or, after having subscribed they affirmed it"; and in stating in answer to said third point that the same was "refused."

2. The court erred in refusing to charge as requested in defendant's fourth point, viz: "That if the jury find that the plaintiff corporation accepted the defendant's interest in the Davidson tract as payment of his capital stock, and has continued to hold and enjoy said interest for several years, and still owns and holds the same, never having offered to reconvey to defendant, then the plaintiff can not recover in this action, and the verdict should be for the defendant."

3. The court erred in charging: "Admitting the argument set up by defendant, that his subscription was agreed between himself, Hartman, Henderson, Faber, and Meskimen, to be considered paid by the estimated increased valuation of the land purchased from Davidson to be true, it would be no defense as against subsequent stockholders, who had paid their subscriptions to the capital stock of the company in money, unless they were cognizant of the transaction before they subscribed or, after having subscribed, they affirmed it."

G. SHIRAS, Jr., for plaintiff in error.

J. VEECH, for defendants in error.

By the Court, AGNEW, J.

This action was brought to recover a subscription to the stock of the company. The plaintiffs having shown that no money was paid by Bailey when he obtained his certificate of stock, the defendant undertook to show that the stock of himself and Messrs. Hartman and Henderson was paid for upon an arrangement by which the company took a tract of coal-land from them at $175,000, which they had bought of D. R. Davidson at $125,000; the company to pay the whole sum of $125,000 to Davidson, and to credit them with the advance in the price, viz: $50,000, in payment of their stock

By this arrangement no money was paid, and this amount of stock represents nothing but an agreed advance in the price of land within less than a week from the time of its purchase. The corporation plaintiff, it is alleged, organized under the Act of 18th July, 1863, the 1st section of which requires the formation of the association to be in writing.

Whether, then, such a writing was entered into does not appear, the parties having contented themselves with giving in evidence only the certificate required by law to be made, attested and recorded. It is testified that the company was organized on the 1st day of October, 1864; the subscription book bears date October, 1864, and on that day, October 1st, the company, composed of Bailey, Hartman and Henderson, took into the association Faber and Meskimen, as appears by their agreement of that date, while the purchase of Henderson from Davidson at $125,000, was made only on the 29th of September, 1864. It is manifest no actual rise in the value of the property had taken place, and both Faber and Meskimen testify that they did not know and did not consent to the Davidson farm being put into the company at $175,000. It also appears from the testimony of both sides that the organization of the company was in contemplation before the purchase from Davidson; that several meetings had been held in reference to the subject, and Meskimen testifies, that the purchase of the Davidson farm was discussed and was opposed by Faber, and that he himself went up with Bailey and Henderson to see Davidson, who agreed to sell at $125,000, and the article was made for it that night. It is very clear from the whole evidence that if the company did take the farm from Messrs. Henderson, Bailey and Hartman, it was at an estimate only, and that these three gentlemen in fact paid nothing for their stock. This raises the question whether such an arrangement constitutes a valid payment of stock under the Act of 18th July, 1863. Upon the supposition that the arrangement was not fraudulent and was consented to by all who were then members of the company, the court was asked to instruct the jury that the arrangement was valid, and that they should find for the defendant. The court refused so to charge, and said it would be no defense as against subsequent stockholders who had paid their subscriptions, unless they were cognizant of the transaction before they subscribed, or subsequently ratified it

We discover no error in this answer. The subscription book of stock shows that the capital was to be $200,000, consisting of 2,000 shares of $100 each, and that the stock of the five originators, Hartman, Meskimen, Bailey, Faber and Henderson, amounted to only 1,080 shares, or $108,000. The recorded certificate also shows that the capital was to be $200,000, divided into shares of the par value of $100, and that but $133,000 had been then (October 26, 1864,) paid in. This sum included an unauthorized and unpaid subscription, in the name of D. R. Davidson. It is obvious, therefore, that the association contemplated the bringing in of other stockholders, besides the five original promoters of the scheme to the extent of 920 shares, or $92,000. It is clearly not the case of an acceptance of land in payment of stock at an estimated value by all the parties in interest. The five promoters were then, perhaps, the only corporators or subscribers to stock, but their scheme contemplated others who were to be affected by what they did and who were to come in under the protection of the same law which authorized the origination of the scheme by the first promoters. It is clear, therefore, that their united consent among themselves, however binding it might be, had they been the holders of all the stock authorized by their scheme, could not affect those whom they contemplated bringing in under the authority of the law, upon which they founded themselves. Such an interpretation of the law would make it the means of perpetrating the most stupendous schemes of fraud. A few individuals founding themselves upon a highly inflated valuation of real estate, covered up and hidden under huge hand-bills, magniloquent descriptions, illuminated advertisements, and paid editorials, could easily draw real capital in hard cash from the dupes too often easily misled by such means. The law contemplates, we think, a stock founded on a payment in money, and not upon estimated values or mere securities for money.

All its provisions tend to this belief. Thus, the power to call in the capital, is to "assess upon each share of stock such sums of money as the company may think proper, not exceeding in the whole the amount at which each share was originally limited," and "no note or obligation given by the stockholder, whether secured by pledge or otherwise, shall be con-

sidered as payment of any part of the capital stock": § 16. A security by pledge of real estate would scarcely be valid as a payment under this clause. "After payment of the last installment of capital stock," the president and directors, with the treasurer and clerk, are bound to make out, sign and swear to a certificate "stating the amount of the capital so fixed and paid in," and also upon an increase of the capital "added and paid in": §§ 19 and 20. These certificates must be recorded in the office for recording deeds. If certificates be not so made and recorded, the officers referred to are made liable for all debts contracted by the company after thirty days from the payment of the last installment: § 21. And by the 31st section, provision is made for filing a certificate with the auditor-general, signed and sworn to by the same officers, before the corporation shall commence business, setting forth the corporate name and purposes of the association, the amount of the capital stock, the amount already paid in and the par value of the shares; and by the 29th section, "no share shall be issued for less than its par value." From these, and other provisions of the law not referred to, it is very plain that the legislature contemplated the organization of every such corporation upon a sound basis of actual cash capital, and intended to guard the public against unsound and illusory schemes. The material facts were to be placed of record where every one desiring to become a creditor or a stockholder, could find them. But of what service will be all this precaution to either creditor or subsequent stockholder, if, instead of a "paid-in" capital, he shall find in the end that it was a mere balloon, needing only to be pricked, to collapse and leave him penniless. It is obvious that property bought on the 29th of September at $125,000 and put in as capital on the following 1st of October, or a few days later, at $175,000, of which not a dollar had been paid, was no payment in money, or anything else of a substantial kind. Supposing the land to be worth $125,000, the additional $50,000 was simply an added estimate, wholly illusory as to the after or incoming subscribers provided for in the first organization. It was merely a scheme to let the promoters in, without payment of anything; while those to follow should furnish the money to carry on the business. Now, without charging or even assuming any

fraudulent intent on part of the gentlemen who were the original promoters of the scheme, the mode adopted by them, however honestly intended, was a manifest non-compliance with the intention of the law, and a violation of the chief safeguard provided for the protection of the public. The incoming subscribers embraced in the articles of association, and following after them, were entitled to a *bona fide* money-subscription from the first promoters, in making up the capital stock, which is the property of the entire company, and in which every subscriber, old or new, has an equal interest. The purchase of real and personal estate for the purposes of the corporation, authorized in the 30th section of the law, is the exercise of a different power by the corporation. When, by a proper subscription and payment of money, it has the possession of a capital in money, the interests of all the stockholders are motives to careful and prudent bargains, and will prevent the payment of their real cash for mere moonshine. Such will not be the case, however, where subscribers are antagonistic, and one set may obtain their stock at nominal values, while others have to pay money. Finding no error in the record,

The judgment is affirmed.

HAND ET AL. v. DEXTER ET AL.

(41 Georgia, 454. Supreme Court, 1871.)

[1] **Bill by minority against majority of stockholders.** It is only in a strong case and when the majority are clearly violating the chartered rights of the minority and putting their interests in imminent danger, that a court of equity will at the instance of the minority of the stockholders in a corporation, interfere with the management of its affairs and appoint a receiver, and in such a case a bill with mere general charges of fraud, illegality, or mismanagement is demurrable. Such facts must be stated, as will, if true, clearly show illegal action by the majority so as to endanger the interests of the minority and make the interference of court necessary for the protection of their rights.

Multifariousness. Where complainants claim by the same right, charge a common wrong and pray a common redress the bill is not multifarious

[1] *Neall* v. *Hill*, 1 M. R. 80; *Faulds* v *Yates*, 3 M. R. 551.

Non-joinder of defendants. The non-joinder of some who should be parties is not ground for general demurrer to a bill, for that may be cured by amendment.

Before Judge KNIGHT; Chambers, Lumpkin County, December, 1870.

Dexter, and about a dozen others, not residing in this State, but in Boston, Massachusetts, Pennsylvania and New York City, with Richard Van Dyke, of said county, as trustee, filed their bill containing the following averments: They, with said Van Dyke, as trustee, own in their own right thirty-two thousand six hundred and fourteen shares of the capital stock of the Yahoola River and Cane Creek Hydraulic Hose Mining Company, a corporation of this State, having its office in Lumpkin county (setting forth their respective names and respective amounts of stock, and that Van Dyke, as trustee, owns forty-three thousand and seventy-six of said shares) which stock is worth, say, $320,140. Before the late war said company had expended, say, $600,000. At the beginning of said war the stock was worth $10 per share or par.

By reason of the war the operations of the company were suspended from 1861 to some time in 1866, and during that time said property became much dilapidated, and needed repairs and other improvements to fit it for mining. Wherefore, in 1866, in Boston, a meeting of all the stockholders was held to arrange for fitting said property for mining. By a vote of all the stockholders, twenty thousand or more of said shares were set apart for said purpose. Harvey King, of Boston, proposed to the stockholders that, if they would turn over to him these shares so set apart, he would advance the money necessary to make said repairs and improvements, and take said shares at not less than $2.50 per share, or sell the same, as he might deem best, at not less than that price. They accepted his proposition, turned over to him these shares and put the whole business of the company under his sole management and supervision, and to enable King the better to control the property, they then and there elected him treasurer and secretary of the company.

Under said contract, in 1866, King came to said county,

and after inspecting said property, pronounced it immensely valuable, began the repairs, etc., spending large sums of money.

Being still more convinced of the great value of the property, King undertook to defraud the stockholders and especially complainants, by surreptitiously and fraudulently managing the business and affairs of said company so as to make it appear to the stockholders and all others that neither the property nor stock was of any value, and by refusing to furnish the funds necessary to complete said work. He also entered up an account against the company for salaries and cash furnished, to, say, $20,000, intending to sue thereon and sell said property under a judgment therefor, and buy it at his own price.

After King's thus bringing said property and stock into such disrepute as to render it valueless, and after repudiating his said contract to furnish money and entering said account against the company, another meeting of all the stockholders, was called to sit on the 14th of October, 1867, in Boston, to raise money to put said property in efficient working order. At said meeting Nathan H. Hand, of Vermont, was elected as King's successor, as treasurer. All the stockholders (except two or three, including Van Dyke) then and there agreed with Hand to transfer all of said property to him for two years, and its absolute control during that time, without hinderance by any of the stockholders there agreeing, and to a transfer of thirty-seven thousand and ninety-three shares of said stock to him as treasurer, to be held by Hand and his successors in office, in trust as treasurer, for the uses and purposes recommended by a committee of stockholders then and there appointed by the stockholders, in consideration that he would furnish money and put said works in good order and pay the debts.

This committee was so to dispose of the stock as to take from each stockholder, *pro rata*, sufficient to raise said last number of shares mentioned, and so as not to take over one half of each one's shares. This stock, thus set apart, was to be applied to the payment of the company's debts, extension of its canal and to get machinery, etc., to make its operations successful. Any surplus not used by Hand in accom-

plishing those purposes, was to be refunded to the contributing stockholders, *pro rata*, according to their stock contributed.

Hand was then to hold these shares without power to assign, sell or pledge them, until the end of said two years (unless before so instructed in writing by a vote of two thirds of the directors of the company, with the concurrence of the treasurer), and then he was to re-assign them to those who had assigned them to him as such treasurer. Under this arrangement, these shares were assigned to and accepted by Hand. King was present when all this was done and agreed to it.

After Hand took possession of the property under that arrangement, King agreed to take stock in payment of his pretended claim of $20,000 and Hand did pay it off in stock, and yet King still holds said stock and votes it as his own. And after King got this stock, he, being a director of the company, combined with Hand and others to reduce the value of said property and stock. King repudiated his agreement to take stock in payment of his said claim, and King and Hand combined with four other named directors of said company, all of Massachusetts, and these four, with the knowledge and consent of King and Hand, but without notice to the other directors, secretly met with King and fraudulently passed a resolution authorizing the president of the company to mortgage all of the property of said company (except said thirty-seven thousand and ninety-three shares) to secure $20,000 to King, and all advances made and to be made for the company by Hand. This mortgage was executed by the president in December, 1868, and bound King to wait till the following October for his $20,000 and interest, and he and Hand released, by its acceptance, all claim on the individual stockholders, and Hand was to rebuild the trestle which had fallen down; was to keep possession as mortgagee, not as treasurer; to receive his salary as part of the necessary expense of the work, and at the end of King's credit to pay King half of the proceeds of the operations till King's debt was discharged, and to use the balance toward paying his own demands. This mortgage was recorded in Lumpkin county, Georgia, on the 18th of March, 1869.

Complainants say said directors had no right to make said

resolution, and that it was done to defraud them. They averred that by reason of the foregoing agreements, the company was not indebted to King or Hand; that King's debt was paid and Hand had bound himself to take pay for his advances out of said stock, etc., turned over to him. Hand paid off some of the creditors of the company by a heavy shave and thereby depreciated the stock. Other debts he would not pay and suits were brought and judgments were obtained against the company, and its property is now at the mercy of the plaintiffs in *fi. fa.* Hand having put said works in operation and having possession since said mortgage exclusively, of all the property of the com pany as mortgagee, was working it for the purposes of said mortgagees, up to the 14th of March, 1870.

On the 11th of March the clerk of the company mailed to each stockholder a written notice that an annual meeting of the stockholders would be held "on the second * * in March, 1870," for election of officers and other business. As appears by the exhibits, on the 14th of March there was a meeting at which thirty-three thousand four hundred and ninety-five shares were represented. At said election Howe was re-elected president; Hand, treasurer, and King, vice president.

At said meeting it was reported that the auditing committee of the stockholders had found the company indebted to Hand $60,564.87, and that King and Hand had released said property from mortgage and ordered the release to be recorded, but did not discharge the company from any part of the debts. Complainants charge that this was but a pretended meeting of the stockholders, and that its said action was intended but to deceive said other stockholders by said release. Said meeting was adjourned over till April 14, 1870. Under this fraudulent arrangement with said directors and said committee who are combined with him, Hand has control of $500,000 worth of property, and is getting $1,500 worth of gold dust weekly, and they are applying it to their own use. And they charge that the auditing committee fraudulently put said Hand's claim at the sum aforesaid and they and said directors knowingly allowed Hand to use ten thousand shares of said stock to control their election, and Hand has used and is using them for his private purposes..

The exhibit of the minutes of the said last meeting shows that these officers were elected by but ten thousand shares majority, and that Hand voted three thousand one hundred and forty shares.

These shares, they say, belong to the company and not to Hand, and he could not legally vote them. They say they had no legal notice of said meetings of March and April, 1870, but "by some means hearing" of the meeting of April, 1870, they sent Weir Boyd, Esq., to represent them; that he went and found nobody present but Hand and the clerk of the company, who claimed to hold the *proxies* of a large number of stockholders; that the clerk presided, saying he was elected to preside at the meeting of March, 1870 (he was elected a director that day); and Hand and the clerk both claimed that this was but an adjourned meeting from March, 1870. Boyd then moved to reconsider the action of March, 1870, and elect officers, but Hand using said ten thousand shares, and the clerk and he voting their *proxies*, and counting but one half of the stock of Boyd's stockholders, out-voted Boyd, and he, protesting that the foregoing proceedings were all fraudulent, contrary to the by-laws, etc., retired from the meeting.

These complainants have tried to get Hand to settle; all the directors but the clerk are non-residents; and yet Hand keeps all the property, appropriates its rents, issues and profits, and is sending them from the State.

They prayed that Hand and King be compelled to perform their original agreements; that said mortgage be annulled; that said thirty-seven thousand and ninety-three shares be transferred to the contributing stockholders; that the property be taken from Hand and turned over to a receiver; that defendants account for all the gold taken; that the meetings of March and April, 1870, be declared illegal; and that the books and records of the company be turned over to such receiver. Discovery was waived.

To this bill defendants demurred, upon the following grounds: 1st. There is no equity in the bill entitling complainants to the relief prayed for. 2d. The remedy in law is complete. 3d. The bill is multifarious because complainants have no common interest in the matters set out in the bill and the causes of action are distinct and the defendants

have no joint or common interest. 4th. Because the exhibits show that there are other stockholders who are not parties, one of whom is a director against whom no complaint is made. 5th. Because complainants do not aver that they have exhausted their ability to get redress in the company, or that they represent a majority of the stock. 6th. Because there is no exhibit of the original contract with Hand. 7th. Because said mortgage is annulled. 8th. Because the court can not set aside the election of corporation officers, etc. By consent this demurrer was heard in Chambers and was overruled by the chancellor on all the grounds taken. This is assigned as error on said grounds.

GEORGE D. RICE, for plaintiff in error.

As to multifariousness, cited 3 Story's Eq. P., secs. 271, 279, 280, 282, 530; Dan. Ch. Pr. 391, 395, 384. There is no sufficient charge of fraud: 36th Ga. R. 518; 38th, 512, 514. The remedy is complete at law: Doug. R. 524; 10th John. 484; 38th Ga. 259. Equity will not interfere in such cases: 2 Hare, 461, 494; Abbott's Dig. 414; 1st Vesey and B. 154; Eden on Inj. 361 and note; 19th Ga. 490; 18th Ga. (*McDougald* v. *Bellamy*); Code, sec. 1619; 8th Cush. 588; Abbott's Dig. 310, 544, 774; Ang. & Ames on Corp., secs. 140, 499, 221, 201.

Formal meeting or vote not necessary: Abbott, 280, 232, 550. The stockholders are personally liable for debts of company: Acts 1868, p. 71. Discovery waived, law will give remedy: 12 Ga. R. 9; 17th, 558. As to the meetings of March and April, 1870: Ang. & A. on Corp., secs. 488, 460. As to voting stock: Abbott's Dig. 309; Ang. & A. on Corp. 136. *Quo warranto* remedy against officer: Code, sec. 3147; Ang. & A. on Corp. 734, and note; 15 John. 378–9.

WEIR BOYD, JOHN A. WIMPY, for defendants.

As to jurisdiction in equity, cited Ang. & Ames, secs. 312, 391–2–3; 18th Howard, 341–2; 11th Ga. R. 569; 1st Story's Eq., sec. 29; Code, sec. 3137; 2 Paige, 222; 2 Black, 720, 721; 21st Ga. 251; 23d, 139. As to multifariousness: 3 Paige, 231; Story's Eq. Pl. 278a, 271; 5th Ga. 571-5, inclusive; 8th

Ga. 236; 9th, 280, 281. There are sufficient parties to the bill: 3 Paige, 222; 3 Mason, 317. *Quo warranto* or *mandamus* is not complete remedy: 22 Ga. R. 507, 539.

McCAY, J.

1. The complainants in this bill are the owners of * * thousand shares of stock in an incorporated mining company of one hundred thousand shares. Its object is to take the property out of the hands of the company, the stockholders, place it in the hands of a receiver, and that a general account be taken. As a court of equity will not appoint a receiver to carry on the business of mining, it follows that there can be no sufficient cause for such a bill, unless the majority of the stockholders are pursuing a course so illegal and ruinous as to require the affairs of the company to be stopped.

The very foundation principle of a corporation is that a majority of its stockholders have a right to manage its affairs so long as they keep within their chartered rights. They may, they often do manage very foolishly, make very bad contracts and do very reckless things. Indeed, as all experience shows, the very business which this company was chartered to carry on is one of great risks and extraordinary vicissitudes and it would be madness for a court to put its cautious and careful hand forward to keep steady an enterprise organized for such risks and undertakings as necessarily pertain to gold mining.

There is no pretense in this bill that the company is undertaking anything outside of the charter. The burden of the complaint is, that the majority, through the officers, are managing the company fraudulently, not for the benefit of all but in the interest of a portion of the stockholders. This is the general charge, and that charge is sustained by the following statement of facts:

1st. The whole company granted to King $20,000 in its stock, and King after awhile repudiated the agreement and set up a claim for $20,000 expended by him for the company.

2d. The whole company, consenting to this repudiation by King, surrendered to Hand as treasurer, thirty-four thousand shares of the stock, to be used by him to raise funds under

the direction of a committee, to put the works in order and pay the debts.

Hand expended (he says and the committee say) three thousand dollars and did put the works in order. He has taken ten thousand shares as part pay for his expenditures, and has an unsettled claim against the company for the balance. There is no charge that he has not expended the money.

It is true, the bill says, the true construction of the arrangement surrendering the thirty-four thousand shares to the company is, that Hand was to take these shares in pay for his expenditures. We are not prepared to say this. The contract does not say so. We see nothing in the charter to forbid expenditures on credit to put the works in order, and if Hand, with the consent of the directors, was willing to do the work or advance the money, we see no reason why the directors might not permit him to do so. He seems to have acted all the time with the approbation of the directors, and indeed, in every thing stated in the bill and complained of, the directors and officers of the company seem to have acquiesced. At the last two meetings of the company, he was sustained in all his acts, and he is still the regular treasurer of the company.

The charge that he and others have been guilty of a fraud in executing a mortgage in violation of the understanding, at the time he was elected treasurer, does not, in our judgment, amount to much. If it was a fraud, it was repented of almost immediately, since it was, soon after its execution, surrendered, and is not now at all in the way.

Nor are we prepared to say it was a fraud. We see no reason why the directors might not, to meet the new difficulties, make such an instrument. That both King and Hand have expended their money to put these works in order, plainly appears, and how it can be a fraud to make them secure we are not able to see.

It is also charged that the complainants had no notice of the meeting of the company at which these acts of Hand were approved. The bill sets forth a certificate of the clerk, taken from the minutes, that he had sent the usual notice, nor does the bill deny its truth. It says they did not have legal notice, sufficient notice. This is very general. Do the by-laws fix

any rule? The bill does not show whether or no the meeting is admitted, and it appears to have been the annual meeting. Is any special notice required of such a meeting? By the general law, we should say not, unless the by-laws so required and this the bill ought to show.

At the meeting the majority largely sustained Hand and the directors in all their acts. It is said, too, that the chairman refused to count more than half their stock. But was not this the bargain, and did he not do the same with all, who, by the agreement of the old stockholders, had surrendered half to the company? Upon the whole we think the charges in this bill are too loose and unsatisfactory to justify the prayer.

If the majority of this corporation are, in fact, managing the affair in the interests of Hand, let the minority appear at the annual meeting, or call one, according to the by-laws, and demand that the true state of the company and its affairs be presented to the meeting. If this be refused, or if, on examination, anything rotten appears, the presumption is that right will be done. If not, let all the facts—not guesses and suspicions—be presented to the chancellor. As it is, the court is groping in the dark, under mere general charges, and is just as apt to do wrong as right in entertaining jurisdiction of the bill. For these reasons we think the bill is demurrable and ought to have been dismissed.

The majority of a corporation have a right to manage their affairs as they think fit, so long as they keep within their charter, and a court of equity will not interfere to prevent unwise or improvident acts; there must be fraud, or the infringement of the legal rights of some one, to justify taking matters out of the hands of the officers.

2. We do not think the bill multifarious. The complainants claim by the same right, charge a common wrong, and pray a common redress. Indeed, there is a privity between them and the corporation which makes one matter of the whole purpose of the bill.

3. The fact that some parties are not joined who ought to be, is not good by way of general demurrer, as the complainants can amend that.

Judgment reversed.

THE WOOD HYDRAULIC HOSE MINING CO. v. KING.

(45 Georgia, 34. Supreme Court, 1872.)

[1] **Corporation contracting in foreign State.** Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board even though the meetings of the board were held out of the State chartering the company.

Essential power to contract. The power to contract and to bind itself to those dealing with it, in matters within the intent of the charter is a necessary incident to every mining corporation, and needs no express grant of such power.

[2] **Power to act by directors.** The general rule is that the directors may do any act within the corporate powers unless restrained by the by-laws or by vote of the stockholders.

Admissions by corporations. A corporation accepting the services of a person as treasurer, and ratifying and auditing his accounts, which show a balance against the company, is bound by the admission in like manner as an individual would be.

[3] **Recovery by treasurer on audited amount—Usury.** When the treasurer of a corporation, with the knowledge and consent of the directors, has raised money for the company on his own credit, paying interest above the legal rate, and his accounts, showing such extra interest, have been audited and allowed, a recovery for the balance, including such interest, is not illegal.

New trial on weight of testimony. When the judge presiding has refused a new trial on the allegation that the verdict is contrary to the testimony, it must be a strong case where this court would overthrow such verdict.

Writ of error to Lumpkin Superior Court. Trial below before PARROTT, J.

King brought *assumpsit* against said company, a corporate body of this State, for his services as its treasurer, and for money paid out by him for the company to carry on its mining operations in Georgia. The defenses were *non assumpsit*, and that King had failed to perform his duty. King was examined by interrogatories and sworn to the correctness of his account, and, to fortify his testimony as to

[1] *Cowell* v. *Colorado Springs Co.*, 100 U. S. 55; 3 Colo. 82.

[2] *Wright* v. *Oroville Co.*, 3 M. R. 558.

[3] *Anglo-Cal. Bank* v. *Mahoney Co.*, 5 Saw. 285; *Mining Co.* v. *Anglo-Cal. Bank*, 104 U. S. 192.

money paid out by him for the company, he produced receipts signed by the parties to whom he paid the said money. He also attached to his answers copies of the action of the board of directors, held in their several meetings, in Boston, Massachusetts. He admitted that it required certain usury to make up the sum total of his account, but said that he had had to pay out usury for the company, with the knowledge and approbation of the directors, and that they submitted his accounts to an auditing committee, who reported that his claim was just and due, and that the directors adopted said report. The report copied from the minutes was also attached to his answers. He denied any and all facts going to make up the defense.

These interrogatories were objected to, upon the grounds that there was higher evidence, in writing, of the facts therein stated; because King's authority to contract debts against the company must be shown by the records of the company; because the vouchers for money paid out were but the written statements of third persons, and because the company was not bound by the action of its directors out of this State.

The objections were overruled, and the testimony was read to the jury.

For the defendant there was evidence tending to show that King had failed to attend to his duty, and to set up a contract made by him as to taking pay on stock which King had denied, as stated by them.

1. Defendant's counsel requested the court to charge the jury that if King, while treasurer of said company, transcended his authority in running the company in debt, by advancing the money himself, when he was authorized to sell stock to raise funds for the operations of the company, and negligently failed and fraudulently refused to put the stock of the company on the market, for that purpose, when requested so to do, and at the same time he could have sold the same at $5 per share, the defendant is not liable.

2. That if the jury were satisfied, from the evidence, that King, the plaintiff, whilst he was treasurer of the company, so managed to depreciate the value of the stock or designedly withheld the same from market, with a view to advance his own individual interest, and not the interest of the company,

and he, at the same time, advanced money in order to keep the said stock from the market, then defendant is not liable, as the plaintiff can not take advantage of his wrong.

3. That, if the jury are satisfied, from the evidence, that the evidence of the plaintiff does not correspond with the account of the plaintiff and sustain his claim, then you must find for the defendant.

The court refused so to charge, but on the contrary charged the jury as set forth in the fifth, sixth, seventh, ninth and tenth grounds for a motion for new trial as hereafter set forth.

The jury returned a verdict for King for $10,651.63 principal, and $2,187.12, with cost of suit. Whereupon counsel for defendant moved for a new trial on the following grounds:

1. Because the court erred in admitting the interrogations of King as evidence.

2. Because the court erred in admitting in evidence the vouchers of Harvey King, treasurer of the said company, as evidence for the plaintiff to prove his individual account.

3. Because the court erred in admitting the report of a committee of stockholders, composed of E. F. Hodges, Joseph Murdock and N. H. Hand, made and reported at a meeting held in the city of Boston, and state of Massachusetts, on the 23d September, 1868.

4. (Withdrawn by leave of the court.)

5. Because the jury found said verdict contrary to the charge of the court in this:

1. A corporation acts and does business by its officers and agents, and these officers and agents derive their powers from the charter, by-laws and votes and resolutions of the corporation. The mode by which corporations manifest their assent, make contracts, etc., is by their common seal or by vote of the company, or by contract, or agreement of their legal authorized agents.

If you are satisfied, from the evidence, that the corporation did not contract this debt by legal votes of the company or by its legal, authorized agents, the company is not liable, and therefore you must find for the company.

2. In this, that the charter, by-laws and resolutions of the company must be strictly pursued by the officers and agents, and if they transcend their authority, the company defendant is not liable.

3. If you are satisfied, from the evidence, that the directors had no legal authority from the stockholders to borrow money through the treasurer, the action of directors authorizing the treasurer and plaintiff to borrow or advance, the same are void, and therefore plaintiff can not protect himself under the action of the board of directors.

For when directors are made agents to do anything for the company, they must follow strictly the charter, vote and resolutions giving them authority.

4. That the principal is bound by all the acts of his agent within scope of his authority. If the agent exceeds his authority the principal can not ratify in part and repudiate in part. He must adopt either the whole or none.

5. If you are satisfied from the evidence that the defendant by its legal agent borrowed money, or the plaintiff advanced the money as agent of the defendant, then the defendant is liable; but if you are satisfied that the money was borrowed or advanced without authority from the principal, then the defendant is not liable.

6. That the principal may ratify the acts of agent; the ratification relates back to the act ratified, and takes effect as if originally authorized; so if you are satisfied from evidence that King, the plaintiff, was not legally authorized to borrow or advance the money, the defendant may afterward ratifiy his acts, and the ratification may be express or implied from the acts or silence of the defendant; and the ratification once made can not be revoked.

7. That the usual mode of proceeding in bodies or companies, where transactions of business are done through committees appointed is, that the subject-matter to be acted upon by the committee is referred to a committee, they, by its chairman, make its report. The report is accepted or received by the body; then the report is adopted by the vote of the body; so if you are satisfied that the report of the committee in which the plaintiff's claim was audited was accepted and adopted by the vote of the company, defendant, then the defendant is liable, and you must find for the plaintiff; but if you find the money was borrowed without authority and the act was not ratified, you must find for the defendant.

8. The jury is only authorized to allow the plaintiff seven

per cent. interest under the law on his claim, and you will, if you are satisfied the plaintiff is entitled to recover, calculate the interest on the amount due at the rate of seven per cent.

9. If you are satisfied, from the evidence, that the plaintiff has, by neglect or bad management, or the failure to do that which he was bound to do in his office, damaged defendant in any certain amount, which must be ascertained by proof, then the defendant is entitled to recover of the plaintiff the amount in this action by way of recoupment.

6. Because the court erred in refusing to charge the jury as requested as aforesaid.

7. Because the court erred in charging the jury that "the eighth by-law of the company is, when the directors shall deem best in their judgment to make contracts, borrow money and run the company in debt by giving the company notes or otherwise, and if you are satisfied from the evidence, that the directors acted according to the best of their judgment for the best interest of the company, and authorized the treasurer to borrow or advance the money, unless such action or borrowing money or contracting was contrary to the charter," (it binds the company.)

8. Because the court erred in charging the jury that if they were satisfied, from the evidence, that the plaintiff borrowed or advanced the money sued for while agent of the defendant, and that he had no authority to borrow or make such advance, that the company, defendant, may afterward ratify said contract, either expressly or impliedly, by vote of the stockholders and directors, or by receiving the benefits of the money borrowed or advanced, made by said agent. If you find, from the evidence, that this is the case, the defendant is liable.

9. Because the jury erred in allowing the plaintiff twelve per cent. on his claim, contrary to the charge of the court and contrary to the law.

10. Because the verdict is contrary to the evidence in the case, etc.

The court refused a new trial and error is assigned on said grounds.

JOHN A. WIMPY, for plaintiff in error.

Corporations must act within their charters: 2 Kent's Com. 299; 2 Cranch R. 169; 13 Peter's R. 587; 2 Cowen's R. 675; 40 Ga. R. 619, 625. Mining companies have no implied authority to borrow money: 2 M. and N. R. 595; 2 Kent's Com. 298 (note). They must act through their officers: A. and A. on Corp., sec. 231; 21 Howard's R. 365. How they appoint agents: A. and A. on Corp., sec. 283; 7 Cranch's R. 305. The treasurer could not bind the company: See Charter acts, 1860, p. 132; 10th By-law; 7 Cranch's R. 305; 2 Barb. R. 107; 13 Peter's R. 287. Authority strictly construed: A. and A. on Corp., sec. 277. The province of directors: A. and A. on Corp., secs. 279, 280; 12 Wheat. R. 113; 4 Mass. R. 596; 18 Ga. 411. If directors had authority to borrow money they could not delegate it to King: A. and A. on Corp. 277; 2 Kinnie's L. C. 492; 26 Wend. R. 485. General agents can not run company in debt: 5 Denio's R. 283. A Georgia corporation can not act in Massachusetts: A. and A. on Corp., sec. 1024; 27 Maine R. 507; 13 Peter's R. 288; 1 Black's, 286; 14 Ga. R. 341. Highest evidence must be produced: R. Code, sec. 3707; 12 Wheat. R. 114, 115.

Receipts of third persons are not admissible: 1 Gr. on Ev., secs. 212, 305.

GEORGE D. RICE, H. P. BELL, for defendant.

McCAY, J.

1. We recognize fully the doctrine that a corporation, as such, does not exist out of the jurisdiction which charters it: 1 Blatch. R. 628; 13 Pet. R. 588; 1 Black U. S. R. 286.

But, while this is true, nothing is now better settled than that a corporation may, by its agents, make contracts, sue and be sued, out of that jurisdiction which gave it birth. This State is full of agents, doing business for corporations of other States, and even for corporations of foreign States; and the authorities are now uniform that an agent of a corporation may exercise its powers out of the State incorporating it, provided there be nothing in the charter or in the nature of its powers contravening it: 13 Pet. R. 588; 34 N. Y. R. 208.

If one agent may thus act, there would seem to be no sensible reason why a board of agents may not do so. As the directors are only agents the principle is broad enough to include them: See 35 Missouri R. 26; 27 Maine R. 509. The evidence is conclusive that this corporation was chartered by this State, and that it went into operation under the charter. Indeed, the fact that the president of the company appears and pleads to his declaration, admits the organization.

Admitting that a stockholders' meeting could not be held out of the State, we must presume that the directors were chosen according to law, to wit, in this State. The evidence is that several of them have been acting since 1861, and there is nothing in any of the pleas or the evidence, showing (nor was it insisted on before the court below) that the directors were not legally chosen. We hold, therefore, that the records of the company, showing the acts of the directors, was good evidence to bind the company.

2. It is not necessary that the charter of a company should specify the powers granted to it, except so far as to specify the purposes of the company, and to define its franchises. Unless restrained by the charter, the grant of corporate powers carries with it the powers necessary to carry the franchise into effect. The power to contract—to incur debts, etc.,—would seem to be incident to every corporation, unless the charter provides to the contrary: 5 Barbour R. 9; 25 Indiana R. 536; 1 Barb. R. 584. It would be impossible for this company to use its franchise without making contracts; and without doubt it may make any contract within the scope of the object of the franchise.

3. The general rule is that the directors of a corporation may do any act within the powers of the company, unless restrained by the by-laws, or by the special votes of the stockholders at their meetings: Angell & Ames on Cor., section 231; and there is nothing in any of the by-laws offered in evidence to limit the power of the directors. We are therefore of the opinion that the directors might lawfully authorize the treasurer to borrow money and to contract debts for the purposes of the charter.

4. But we are of the opinion that if a corporation accept the services of another and actually receive and use monies

advanced by him, it can not set up want of authority in its charter to make the contract. It would be outrageously unjust to permit a corporation to thus practice a fraud upon one dealing with it. If a corporation undertake to exercise a franchise not granted by its charter, there is strong authority for holding the act void and permitting even the corporation to repudiate. Since, as it is said, the act is *illegal*, contrary to public policy. But where the objection is not that the corporation has undertaken to exercise a franchise not granted to it but that its officers or agents have exceeded, not the powers of the corporation, but their own powers as agents, a different rule obtains. In such cases they stand like other principals employing agents, and if they knowingly receive the fruits of the excessive exercise of authority by their agents, they are held to have ratified the act.

The proof here is abundant that Mr. King advanced the money and gave his services under his undertaking with and by the consent of the directors, and the proof is equally strong that the company has received and used both his services and his money.

5. We see no illegality in allowing the credit to Mr. King of the extra interest he had to pay to raise the money. He was acting under the orders and by the consent of the directors, and the facts of the case show that this extra interest is not a charge for the use of Mr. King's money, but a mere return to him of money paid out by him for the use of the company. This account was audited by a committee, these items recognized, and we see no reason to disturb the account stated and agreed upon by both parties.

6. Without doubt there is a conflict in the evidence and we are not prepared to say that the evidence does not preponderate somewhat in favor of the company, on at least two of the issues made in this case, to wit:

Whether the $1,500 was an advance by way of loan, or whether it was in part payment of stock, to be taken by Mr. King; and second, whether Mr. King did not specifically damage the company by failing to put the stock upon the market. But as there was evidence on both sides upon these issues, we are not disposed to disturb the verdict, sustained as

it is by the refusal of the judge who tried the case to grant a new trial.

We think the jury might well have felt themselves justified in considering the report of the auditing committee as settling these questions in favor of Mr. King, and the evidence of the present president of the company is an admission of the truth of Mr. King's claim as it stands.

We do not therefore think this is such a case as demands our interference.

It requires a very strong case to justify this court to overturn the verdict of a jury with the judgment of the court sustaining, in a question of evidence.

Judgment affirmed.

THE CHEROKEE IRON CO. v. JONES.

(52 Georgia, 276. Supreme Court, 1874.)

[1] **Ultra vires: iron company enjoined from building flour mill.** A company organized to manufacture pig iron undertook to erect a flour mill, which the plaintiff, a stockholder, sought to prevent by injunction. *Held*, that the right to use the corporate funds depends upon whether the use is incidental to the corporate object (as to feed the men and animals employed), or whether it is a leading object in itself (as to grind for the public generally), and under the evidence the injunction granted below was allowed to stand.

Error to Polk County. Case heard below by Judge UNDERWOOD.

Jones filed his bill against the Cherokee Iron Company making, in substance, the following case:

An act of the legislature of February 18, 1873, incorporated A. G. West, J. H. Browning and A. Griffith, and such other persons as they might associate with them as the Cherokee Iron Company, located in the county of Polk, with power only to make and manufacture pig iron. On the 5th of March thereafter, the corporators named, together with

[1] *Watt's App.*, 78 Pa. St. 370; *Post* LACHES; *Callaway Co.* v. *Clark*, 32 Mo. 305; *Searight* v. *Payne*, 2 Tenn. Ch. 175; *Post* STAT. FRAUDS.

the firm of Philpot, Jones & Company, said firm composed of Calvin Philpot, J. H. Dodds and complainant, merchants, entered into written articles of agreement, in substance as follows: The corporators named and "the firm of Philpot, Jones & Company," agree "that they will become the owners of the capital stock of the Cherokee Iron Works of Polk county, lately chartered by the general assembly of the State," fixing said capital stock at $150,000, with the privilege of increasing the same, and fixing the shares of the parties respectively as follows: A. G. West, one third, Browning, one third, Griffith $20,000, and "the firm of Philpot, Jones & Company," $30,000. If the whole capital named should not be required, each to contribute in the proportion mentioned. Each to have interest on his payments at eight per cent. until the furnace should be put in blast, at which time stock to be issued to each in proportion to the amount of his payments, provided no member by making advancements should be entitled to more stock than the portion first agreed to be taken. Each obligates himself to use his utmost endeavors for the interest of the company.

At the time this agreement was made the complainant was the owner of a valuable flouring and grist mill near Cedar Town, and near the location of the company's proposed works. This was one principal reason why he consented for said firm to take stock, believing the iron works would greatly enhance the value of his mill, a short time before purchased at about $20,000. At that time it was not contemplated that the company would manufacture "to any considerable extent," anything but iron, as provided by the charter; and certainly not, that it would erect a flouring and grist mill; or if so, it was carefully concealed from him. Therefore, with his approval, the firm of Philpot, Jones & Company had paid about $15,000 on their stock, which, with the other subscriptions, he had hoped, was being properly expended.

Without his knowledge certain stockholders had applied at the last session of the legislature for an amendment to the charter, giving power to erect other machinery, etc., the object of which was to obtain covertly the power to erect a mill in connection with the other works. On hearing this he endeavored to defeat the move, and did secure a proviso in the act, which he hoped would protect his interest.

At any rate, he has assented to no amendment which will authorize the company to build a mill but has all the time expressed his dissent and his intention to resist any attempt to do so. Notwithstanding these facts, the company is about to begin the erection of a flour and grist mill near the furnace, and within about two miles of his mill; has already built the dam, hauled part of the lumber, and unless restrained will complete the same, thereby misapplying the funds and property of company and greatly injuring him by withdrawing and diverting custom from his mill. Had he known of such purpose of the company he would never have consented for said firm (in which his interest is one third), to take stock or make payments as aforesaid.

Prays injunction and general relief.

The answer of the defendant set up the following facts: The building of the mill was contemplated at the time of the organization, and such purpose was not in any manner concealed from complainant. The company had no motive to conceal any purpose from him. The building of a mill *was* contemplated and provided for from the first as a matter of course, the same being a necessary appendage to, if not a part and parcel of such works. It is customary among all such companies to have a mill, shops and other appendages to the main works, for the purpose of supplying themselves, their employes and dependents and the public generally so far as their own demands will admit.

Such appendages are necessary and valuable aids to the success of the main enterprise. No practical iron manufacturer considers such works, located as they usually are, remote from the ample and steady supply of a city, complete or properly equipped without such appendages. The company's works are located in a rural district, twenty miles from Rome, the nearest town of considerable size. When in full operation, they will employ about three hundred hands, who, with their families, will make a population of about one thousand, all dependent on the company for their daily supplies.

About seventy-five mules, besides a large number of oxen, will also be employed, all the grain for the feed of which should be chopped or partially ground, as a matter of economy. It is essential to the success of the company that the large supply

of breadstuffs and grain thus acquired be constant—not dependent on the will or favor of others, nor liable to casualties, and be furnished with as much economy as possible. To accomplish this it is necessary to have a mill. The tolls it will probably receive from such grinding as it may do for the public will furnish a considerable part of the supply required. Besides there are on the lands of the company purchased for supplies of iron ore and timber, nine hundred acres of productive open land contiguous to the company's works, the rents and profits from which will yield the company a large amount of grain.

This fact alone makes the possession of a mill by the company for grinding and preparing this grain for its own use a matter of great economy and necessity.

The answer then proceeds to give a detailed history of the operations of the defendant since its organization, in all of which appears the intention to erect a mill and to show the complainant's acquiescence. Offers to release complainant from his subscription to stock, and to refund to him what he has paid in with interest thereon. Alleges that complainant's real object is to force the defendant to purchase his mill at an exorbitant price.

The bill was supported by an additional affidavit from the complainant. The answer by the affidavit of A. Griffith, a stockholder in defendant, and the affidavits of James Noble, Sr., John W. Noble and Thomas McCullough.

The chancellor ordered the injunction to issue as prayed for and defendant excepted.

WRIGHT & FEATHERSTON, for plaintiff in error.

ALEXANDER & WRIGHT; HAMILTON YANCEY; JOSEPH A. BLANCE, for defendant.

McCAY, J.

It is very plain that if the real purpose of the managers of this company is to erect a corn and flour mill for general purposes, as an independent enterprise, and not as a mere incident to the iron works, they are entering into a business *ultra vires*, and one which the complainant is not committed to—

nay, one that the corporation, as such, has no legal right to undertake. Whether this be so or not, is not clear. One can not fail to suspect that the iron works of this company are still rather in the mist, and we are not surprised that the judge has seemingly come to the conclusion, that if let alone, all the funds will go into the mill, and instead of being a mere incident to the iron works, it will be the sole enterprise. At any rate, as this is a question of fact, and the judge has seen fit to grant the injunction until the case can be heard before a jury, we will not interfere. We incline in favor of the judge's view of it, and think he has exercised his discretion wisely.

Whether the corn and flour mill is not the best investment, is not the question. The complainant has a right to insist on it that the funds of the company shall go to the uses designed by the charter, and all the parties together do not, as a corporation, have the legal right to engage in the milling business, except as a mere incident to the purposes of their incorporation.

Judgment affirmed.

STATE OF NEVADA EX REL. COREY V. CURTIS.

(9 Nevada, 325. Supreme Court, 1874.)

Irregular by-laws made valid by user—Election of trustee a corporate act. The board of trustees of the O. S. M. Co. consisted of seven members. At a meeting at which only six were present it was voted to elect a trustee to fill the vacancy; the vote resulted in a tie, whereupon the president of the board, having voted as trustee, claimed the right to give the casting vote under one of the by-laws of the corporation, and voting again for Lyle, one of the two candidates, declared him duly elected trustee; and thereupon Lyle, against the protest of three of the trustees, proceeded to act as a member of the board, and to vote with the others for the election of a superintendent. Upon an application by the superintendent, so elected, for a writ of mandamus to remove the prior superintendent it was *held*, that the by-laws, although adopted by the stockholders, instead of the trustees, yet, having been properly recorded in books kept by the trustees, and acted upon both by them and the stockholders for a long period of time, must be treated as the regular by-laws of the corporation, but that this particular by-law was void, because contrary to the charter which provided that a majority of the

board must decide upon corporate acts, the election of a trustee being a corporate act.

Officer de facto, defined. *Held, also*, that the acts of Lyle could not be sustained as an officer *de facto*, because it is upon the principle that third persons, not cognizant of the fact, must be protected, that such acts are sustained, and in this case all parties interested had knowledge that Lyle was not an officer *de jure*. To create an officer *de facto* it is necessary that he should be in peaceable possession of the office, actually exercising the functions of an officer; it is not sufficient that he has intruded himself by force.

This was an application to the supreme court for a writ of mandamus to remove the respondent from the office of superintendent of the Ophir Silver Mining Company. The petition of the relator set forth fully the facts upon which he relied. An alternative writ was issued, requiring the respondent to show cause why he should not be removed and surrender up the office of superintendent. On July 17, 1874, the return day of the writ, respondent appeared and filed an answer, alleging that the proceedings, claimed by the relator to constitute a removal of the respondent and an election of the relator, were void. The property of the Ophir Company, situated at Virginia City, being of great value, the controversy as to who was entitled to act as superintendent and have the management thereof became of great importance to the parties interested. The facts are stated in the opinion.

HALL MCALLISTER, for relator.

GARBER & THORNTON and MESICK, SEELY & WOOD, for respondent.

By the Court, HAWLEY, J.

The board of trustees of the Ophir Silver Mining Company consists of seven members: At a meeting held on the 29th day of June, 1874, there were present six trustees, viz: Lissak, Locan, Hassey, Baldwin, Grayson and Hall. On motion, a vote was taken to elect a trustee to fill a vacancy occasioned by the resignation of trustee Peart. This vote resulted in a tie; trustees Lissak, Locan and Hassey voting for W. S. Lyle; trustees Baldwin, Grayson and Hall for J. S. Wall; whereupon trustee Lissak, president of the board, having voted as a trustee, claimed the right to give the casting vote under art. VI. of the

by-laws of the corporation, which provides that the president "shall have the casting vote at all meetings of the stockholders and trustees," and again voting for W. S. Lyle declared him duly elected a trustee.

At the same meeting, motions were made to declare vacant the position of superintendent held by respondent, and to elect a successor. Trustees Baldwin, Grayson and Hall objected to Lyle voting, and claimed that he was not legally elected a trustee, having only received three votes, and further claimed that there was no vacancy, respondent Curtis having been regularly elected superintendent on the 22d day of March, 1874, and never having been legally removed. Notwithstanding these objections the motions were carried in the affirmative and the relator, Corey, was elected superintendent by the votes of trustees Lissak, Locan, Hassey and Lyle; trustees Baldwin, Grayson and Hall voting in the negative.

1. It is contended on the part of respondent that the by-laws of the Ophir company are void. First, because they were adopted by the stockholders instead of the trustees. It appears that they are the only by-laws ever adopted by the corporation. They are found properly recorded in the books kept by the board of trustees, and have been used, acted upon and referred to as the by-laws of the corporation, both by the trustees and stockholders, ever since their adoption in 1860. Under these circumstances, we think they must be considered and treated as the regular by-laws of the corporation. Second, it is claimed that the particular section of the by-laws under which the president is given the casting vote is void, because inconsistent with section 7 of the act providing for the formation of corporations, which declares that: "A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act": General Laws of California, 1 Hitt. 938. But relator contends that under section 5 of said act, an exception is made in cases where the election is to fill a vacancy. Section 5 provides: "When any vacancy shall happen among the trustees by death, resignation or otherwise, it shall be filled for the remainder of the year in such manner as may be provided by the by-laws of the company": 1 Hitt. 936. Article

III of the by-laws provides that: "Vacancies in the board of trustees shall be filled by the other trustees in office." Relator also claims that an election to fill a vacancy is not a corporate act and therefore not necessary to be performed by a majority of the board.

Is the election of a trustee to fill a vacancy a corporate act? To have perpetual succession and, of course, the power of electing members in the room of those removed by death or otherwise is among the ordinary incidents of a corporation: 2 Kent Com., Sec. 277. "The power to fill vacancies in a corporation and elect officers is a corporate incident": Angell & Ames on Corporations, Sec. 144; *Kearney* v. *Andrews*, 2 Stockton Ch. (N. J.) 72; *Gashwiler* v. *Willis*, 33 Cal. 19. In the general provisions concerning corporations we find that every corporation has power: "To appoint such subordinate officers and agents as the business of the corporation shall require": 1 Hitt. 746. In the act, under which the Ophir was incorporated, it is provided that the corporation shall have power "to appoint such officers, agents and servants, as the business of the corporation shall require": 1 Hitt. 935. Trustees are elective officers of the corporation; and it follows from the foregoing provisions that their election is a corporate act. Being a corporate act it must be exercised in the manner required by the charter. The act provides that "a majority of the persons duly assembled as a board shall be valid as a corporate act." The by-law creates a right of election contrary to the charter. It authorizes an election to fill a vacancy by a less number than the majority. For instance, in the present case, there is an equality of votes; and instead of the election being made by a majority the president really names the trustee. A corporation can not make by-laws contrary to its charter, and it appears to us quite clear that this particular portion of the by-law, if it is susceptible of the construction claimed for it by relator's counsel, is in violation of the charter under which, and in conformity with which, all corporate powers, all corporate acts, must be exercised. We must not be understood as deciding that the power of electing trustees to fill vacancies was delegated to the board of trustees; for upon this we express no opinion; but if so delegated it was not the intention of the legislature to invest the trustees with the

power to exercise such a right in any other manner than other corporate acts are exercised; and no right of performing any corporate act unless by a majority vote having been given by the charter, it was not within the power of the stockholders or trustees to change this provision by adopting a by-law giving to the president a double vote. The *manner* of the election might be regulated by the by-laws, but the *substance* must be in conformity with the charter: *The State* v. *Adams*, 2 Stew. (Ala.) 237; *Kearney* v. *Andrews*, *supra*.

Again, it is conceded that the president would not have the right in all cases to give the casting vote and respondent's counsel contend, for this reason, that the by-law is void; that a single entire clause of the by-laws can not be good in part and bad in part. We think that this objection is also fatal to this particular clause of the by-laws. In *The King* v. *The Steward, etc., of Faversham*, Lord KENYON, Ch. J., said: "Though a by-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other": 6 T. R. 356. "If a by-law be entire, so that the part which is void influences the whole, the entire by-law is void": Ang. & A. on Cor., Sec. 358. The same doctrine has frequently been announced in the construction of statutes. It is true, as was said by SHAW, C. J., in *Fisher* v. *McGirr*, that "there is nothing inconsistent in declaring one part of the same statute valid and another part void": 1 Gray, 22. This is sustained by the decisions of this court: *Evans* v. *Job*, 8 Nev. 342. But in all the cases brought to our notice where this principle has been applied, it is where the respective portions of the statute were wholly independent of each other. Judge COOLEY says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, * * * but whether they are essentially and inseparably connected in substance": Cooley's Con. Lim., 178. This distinction is always recognized in the authorities: *Lathrop* v. *Mills*, 19 Cal. 530.

2. Was Lyle such a *de facto* officer as to make his acts valid and binding? What is an officer *de facto*? "One who has the reputation of being the officer he assumes to be, and yet is

not a good officer in point of law": *Parker* v. *Kett*, 1 Lord Raymond, 658; *The King* v. *The Corporation of Bedford Level*, 6 East, 368. "One who actually performs the duties of an office, with apparent right and under claim and color of an appointment or election": *Brown* v. *Lunt*, 37 Maine, 428. "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer *de jure*": *Brown* v. *O'Connell*, 36 Conn. 451. "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*": *Mallett* v. *Uncle Sam G. & S. M. Co.*, 1 Nev. 197; *Plymouth* v. *Painter*, 17 Conn. 588. Such in brief are the general definitions under which we are asked to declare Lyle a *de facto* trustee. We do not deem it necessary to examine minutely all the points with the numerous subdivisions which were ingeniously and elaborately argued by the respective counsel with a citation of authorities indicative of an extended and praiseworthy research; but shall confine ourselves to what we deem the controlling points in this branch of the case.

The principle of sustaining the acts of persons as officers *de facto* is designed as a shield for the protection of the public and of third persons, who are not cognizant of the true state of the facts and are not required by the law to inquire into the title of one who is found exercising the duties of a public office. In order to protect third persons transacting business with such officers under such circumstances as to induce them to believe that they were dealing with legal officers, the law has reached out its strong arm to a dangerous extent, upon the principle that although not officers *de jure*, they were officers in fact whose acts public policy required should be considered valid. Such a principle certainly ought not to be extended to a case where the rights of the public are not affected, nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer *de jure;* for in such a case the reason of the rule no longer exists and the law should not be invoked for protection. As was argued for the Crown in the case of *The King* v. *Lisle*, decided in the court of King's Bench in 1738, "As an officer *de facto* is a notional creature only, erected by the law in order to answer the ends of justice and equity under

particular circumstances, his power ought not to be extended further than what is absolutely necessary for that purpose": Andrews, 166. In the case of *The King* v. *The Corporation of Bedford Level*, Lord ELLENBOROUGH, C. J., said: "In this case Gotobed was never more than deputy; and therefore after the death of his principal he never could have had the reputation of being more than deputy; but such reputation must necessarily have ceased with the knowledge of the death of his principal. When that fact was notorious to the owners of land in this level, no one could have registered his deeds with him under a belief that he was acting as the assistant of one, who by the course of nature had ceased to fill the office, in the execution of which he was to be assisted by the deputy.

Although the law does not always take into consideration the mode by which the office was obtained, yet in order to make a person an officer *de facto* it does require that he should in some way be put into the office and that he should also have secured such a holding thereof as to be considered really in peaceable possession and actually exercising the functions of an officer. It is shown by the affidavits of Baldwin and Grayson that "the first time W. S. Lylé ever attempted to act as a trustee of said company was on the said 29th day of June, 1874, when the president attempted to declare him elected as a trustee." There was no acquiescence in his election. The three trustees who voted against him endeavored to prevent his voting and protested against his being allowed to vote or to take any part whatever in the proceedings of said board. It is true that subsequent to his pretended election a motion was made and carried by an unanimous vote to allow a certain bill. It is also true that Lyle intruded himself by force and actually voted as a trustee at a subsequent meeting of the board. But these acts did not make him a *de facto* trustee. In the case of *The State* v. *Wilson* it was attempted to be proved that one Evans, who had signed orders as adjutant, was in fact adjutant because he acted as such afterward at a muster. The court said: "The evidence that Evans acted as adjutant afterward at the muster can not have relation back, or prove the existence of the authority at the time the orders were issued. *There should have been some evidence that he had acted previously*": 7 N. H. 547. In *Gold-*

ing v. *Clark*, the court held that "in the case of proceedings of an ancient date, it might be presumed from the regularity of the subsequent proceedings, from the acquiescence of parties interested or from other circumstances, that the records upon the books of a proprietary were made by the clerk, either duly elected or *de facto* exercising the office; but no such presumption can be properly allowed where the transactions recorded are of recent date and the facts admit of ready proof. It was therefore necessary to introduce some evidence tending to show that the supposed clerk acted as such under claim of an election to the office, beyond the mere fact of making the records in question": 34 N. H. 154. In *Hall* v. *Manchester*, the same principle was announced. The record failed to show that the selectmen had been elected and their acts in laying out a highway were attempted to be upheld by showing that they acted as such during the year. The only evidence offered was "that two of them undertook to lay out the highway in question." The court said: "There is nothing else in the whole case tending to show that they acted in that capacity and their authority to do that one act is disputed here, and is the very question now in controversy; and to hold that this act furnished any evidence in their authority to act would be begging the whole question": 39 N. H. 301.

While it is an established principle that the acts of all public officers having the presumptive evidence of title by law, commission, election or otherwise, and the actual peaceable possession of office, are valid as far as they affect the interests of the public or of third parties; yet, we think as was held in *Vaccari* v. *Maxwell* "that the decisions in relation to the acts of officers *de facto* are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office": 3 Blatch. 377. If the opposing trustees had acquiesced in the selection of Lyle, and allowed him, without objection, to vote upon the removal of respondent and the election of relator, then it might be claimed with some degree of reason, supported by authority, that he was a *de facto* officer; and if Curtis had surrendered up his authority and allowed Corey

to act, then the latter would have been superintendent *de facto*, and all his acts as such would have been binding upon the corporation, although he had not been legally elected to the position. But by what parity of reasoning can it be said that Lyle had any authority to bind the corporation? He was not elected trustee. He did not have even the color of an election. The very record offered for the purpose of proving his election shows affirmatively that he was actually defeated, not having received a majority vote. He did not have even "an apparent or *prima facie* right" to act as a trustee. His right to vote was denied. Neither the interests of the public nor the rights of third parties were involved or in any way affected by the proceedings. The whole contest is narrowed down to a proposition between two opposing factions equally divided in number as to which shall have the control and management of the property owned by the corporation. None of the reasons which invoke the protection of the law in order that the ends of justice may be attained can here be urged. The respondent being entitled to the position he holds, it follows that the writ must be denied.

It is so ordered.

Writ denied.

RICE'S APPEAL. AHL'S APPEAL.

(79 Pennsylvania, 168. Supreme Court, 1875.)

Sale of mortgaged bonds. Distribution of proceeds—A corporation issued bonds payable to bearer and secured by a mortgage on its property, franchises, etc. The directors authorized Jones to raise money for the corporation and delivered bonds to him as collateral for money he might raise. He borrowed money on his own note, pledged bonds to the lender, and applied the money for the company's use. The property, franchises, etc., were sold under the mortgage. In distribution of the proceeds: *Held*, that the lender was not to receive the full amount of the bonds and account to Jones, but that he was entitled only to his loan and interest.

Bonds tendered as security for purchase money of land and refused. Ahl sold land to the company; as part of the consideration he was to receive bonds secured by a second mortgage to be issued; he delivered the deed; judgments were confessed by the company, after which the

mortgage was executed. The bonds were tendered to Ahl; he refused them because of the judgments; the bonds were then otherwise appropriated by the company. *Held*, 1. That the setting apart of the bonds to Ahl gave him no claim for their amount in the distribution; 2. That in the distribution it was a question of lien, and Ahl had no lien; 3. The mortgage having been given to secure the bonds and Ahl not owning them, he had no lien, equitable or legal, through the mortgage for the purchase money for which the bonds were to be delivered to him. After his rejection of the bonds he had no further claim on them; the company could dispose of them as they pleased. He had only a right of action against the company for the purchase money.

Fraud—Credit Mobilier contract. Ahl and Jones projected and organized a railroad and mining company in order that Ahl might sell his lands to the company, and Jones build a railroad for it. They owned most of the stock, controlled the corporation absolutely, and co-operated with each other in selling the land and contracting for building the road. *Held*, that the burden was on them to show the fairness of the transaction, and under the facts of the case it was decreed that the sale of the land by Ahl to the company was a fraud in fact and in law.

[1] **Fiduciary parties making profit.** Promoters, directors or agents of a company are not permitted to make profit out of it in buying lands or dealing with it.

Indemnity to surety is indemnity to principal. Where a surety, or one standing in that position, for the payment of a debt, receives security for his indemnity or to discharge such indebtedness, the principal creditor is entitled to the security, although he may not have given credit on the faith of it or known of it at the time.

June 2, 1874, at Harrisburg. Before AGNEW, C. J.; SHARSWOOD, WILLIAMS, MERCUR and GORDON, JJ.

Appeal from the decree at Nisi Prius. In equity. Of January term, 1873. In the distribution of the proceeds of trustees' sale of The Southern Pennsylvania Iron and Railroad Company.

On the 22d of March, 1867, an Act of Assembly authorizing the incorporation of the Caledonian Iron and Railroad Company was passed. The capital was to be $300,000, with power to increase it to $500,000, in shares of $100 each, or to such an amount as might be "necessary to the full and complete operation of the company." The number of directors to be nine. A director might be an agent or officer with a salary. The company was authorized to hold 16,000

[1] *Densmore Co.* v. *Densmore*, 3 M. R. 569; *Cumberland Co.* v. *Sherman*, 1 M. R. 322.

acres of land, with power to mortgage, sell, etc.; to mine, manufacture and prepare for market, timber, coal, iron-ore, etc.; sell the same, etc. Also, to construct and operate a railroad, or railroads with branches to connect with any railroad "now or hereafter to be built." Also to be subject to the provisions of the General Railroad Law of February 19, 1849, and its supplements. The stock might be paid for in real and personal estate, "at a *bona fide* valuation to be agreed upon by a majority in interest of the subscribers and stockholders." The company might issue coupon bonds at an interest not exceeding 7 3–10th per cent. per annum, and sell them at their "market value." A supplement of April 10, 1867, amongst other things, authorized the purchase of 4,000 additional acres of land, directed the mode of organizing the company, etc. A meeting for receiving subscriptions was held May 16, 1867, and 870 shares of stock were subscribed. Amongst others, D. V. Ahl subscribed for one hundred shares; most of the other stock was subscribed for by Ahl for the other persons in whose names it was taken. Another meeting was held June 12, 1867, and some further steps taken toward organization; after which the project was virtually abandoned.

D. V. Ahl was an iron-master, and with his brother, P. A. Ahl, owned iron-land in Franklin county, in the vicinity of the projected road, the title generally being in the name of D. V. Ahl. Some land was purchased by him afterward, and about March 21, 1868, he had about 5,000 acres. After some efforts by D. V. Ahl, with a view to selling his lands and building a railroad, which were not successful, the subject came to the knowledge of Richmond L. Jones, Esq., of Reading, and after some correspondence, he and D. V. Ahl had a conference with reference to it, on the 23d of November, 1868. A plan was proposed, of which a written memorandum was made. It was: to organize a company with $800,000 capital, to which were to be transferred the charter and stock of the Caledonia company; Ahl to convey his lands, about 5,000 acres, to the company for $50,000 in money, $50,000 in the bonds of the company, and $50,000 in capital stock. Jones and his associates to pay into the treasury $450,000, of which $50,000 were to be paid to Ahl for the land, and $400,000

applied to the construction of a railroad from the land to Chambersburg, or some more expedient point. Jones and his associates to receive for their advance $450,000 in the bonds of the company and $450,000 in its capital stock. In the memorandum it was declared that it was not to be binding as an agreement. There was much correspondence between Ahl and Jones, in which secrecy as to their plans was enjoined by Ahl and assented to by Jones. Ahl having informed Jones that the charter of the Caledonia company could be obtained, they agreed that the enterprise should be carried on under it, and, as the master found, they entered into it "for their individual profit, using the machinery of the corporation for the purpose." It was at first supposed that the railroad to be built would be eighteen miles long. It was afterward ascertained that it would be twenty-four miles. About January, 1869, the plan stated in the memorandum was changed, and it was then arranged that the quantity of land to be conveyed by the Ahls should be increased to 10,000 acres; that Jones and his associates were to receive for the construction of the road $625,000 in stock at 50 per cent., and $625,000 in the bonds of the company at 50 per cent.; the Ahls to be paid for the 10,000 acres, including stock and personal property, $200,000 in stock at 50 per cent., and $200,000 in bonds at 50 per cent.

A supplement to the act of incorporation of the Caledonia company was passed February 20, 1869; it authorized them to issue bonds to be secured by mortgage on their lands, railroads, franchises, etc., to purchase lands and personal property and pay for them in stock, to be credited as full paid; to change the name of the company, to purchase the stock theretofore issued, to sell or cancel it, as the directors might order. A meeting of the company was held February 25, 1869; the whole number of shares then taken was 911; Ahl owning 420 shares and three others owning 40 shares, were at the meeting. The supplement of February 20, 1869, was accepted and four directors, of whom James McCarty was chosen president, were elected; neither D. V. Ahl nor R. L. Jones were elected directors.

At a meeting of the directors March 5, 1869, a contract was entered into with Jones by which he contracted to con-

struct a railroad from a point on the Cumberland Valley Railroad, between Chambersburg and Greencastle, to Mercersburg, and thence to a point on the land of Ahl, near Mt. Pleasant Furnace, for which he was to receive $625,000 in stock and $625,000 in first mortgage bonds of the company intended to be issued, Jones to give security in $200,000 for the performance of the contract, and if the security was not entered in ninety days, the contract to be void.

Another supplement to the act of incorporation was passed April 30, 1869, which changed the name of the corporation to the Southern Pennsylvania Iron, Land and Railroad Company; all the rights, franchises, etc., and the restrictions, etc., of the Caledonia company to continue, the obligations, etc., of the company not to be affected; subscriptions to the stock to be recovered in the new name; this supplement was accepted May 1, 1869. On the 24th of December, 1869, under the acts of assembly and by authority of a resolution of the stockholders, the directors resolved to issue coupon bonds of the company to the amount of $625,000, payable on the 1st of March, 1900, with interest at seven per cent. per annum, payable semi-annually, and secure them by a mortgage in trust to J. Edgar Thomson and Frederick Watts, on their railroad, rolling stock, real and personal estate, etc., and corporate franchises. A mortgage was made accordingly on the 1st of March, 1870. On the same day the company entered into an agreement with the Cumberland Valley Railroad Company, by which the latter agreed to lend them $300,000, to be advanced *pari passu*, with the amounts expended by the Southern Pennsylvania Company upon the road, and in installments not exceeding ten per cent. per month, the loan to be secured by the first mortgage bonds of the company, they to deliver to the Cumberland Valley Company 2,000 tons of railroad iron. By the same agreement they leased their road, when completed, to the Cumberland Valley Company for 199 years. On the 23d of July, 1870, the directors authorized the further issue of bonds to the amount of $200,000, at seven per cent., payable semi-annually in gold, on the 1st days of March and September, the principal payable on the 1st of September, 1880, to be secured by a mortgage on the company's property and franchises to John Rice, trustee. A mortgage was made accord-

ingly, with the proviso for the sale of the mortgaged property in case of default of the payment of interest or principal. The railroad was completed about October 1, 1871, accepted by the Southern Pennsylvania Company, and passed into the hands of the Cumberland Valley Company under the agreement of March 1, 1870.

Default having been made in the payment of the interest, Rice, the trustee, and certain second mortgage bondholders as plaintiffs, filed a bill in equity in the Supreme Court against the Southern Pennsylvania Company and others, judgment creditors. One of the prayers was for a decree directing the sale of the mortgaged premises and distribution of the purchase money, the sale not to divest the lien of the first mortgage nor the contract and lease with the Cumberland Valley Company, but the purchaser to take subject to them. A sale was decreed in accordance with the prayer.

Rice, the trustee, was allowed by the court to purchase at the sale; the property was struck down to him at $305,000; the sale was confirmed January 4, 1873; his bid by leave of the court was transferred to J. Edgar Thomson, and the deed was made to him. On the same day Charles H. T. Collis, Esq., was appointed master to distribute the fund; the court directed the fund to be invested.

The master sat on the 20th of January, 1873, and on a number of days subsequently.

He reported that the trustee submitted a statement charging himself with $305,000, and claimed credit for his own commissions, counsel fees and other expenses amounting to $12,871.50; he agreed also that he should be charged with interest at 6 per cent. on $305,000 from the 27th of January, 1873.

The claims presented to the master were:

Augustus F. Boas—Judgment in Franklin county, No. 203, to August term, 1870, entered June 9, 1870, with interest and costs . . .	$32,894.32
Farmers' National Bank of Reading—Judgment in Franklin county, No. 204, to same term, entered June 9, 1870, with interest and costs .	32,894.32
Same bank, Reading Savings Bank and Bushong & Brothers—On ninety-seven second mortgage bonds	97,000.00
Coupons on same, due September 1, 1871, March	

1, and September 1, 1872, with interest; and three months, twenty-two days' interest, due on each in addition		12,771.24
Henry M. Keim—on three like bonds . . .		3,000.00
Coupons for same time		188.13
Kensington National Bank—on sixty-five like bonds		65,000.00
Coupons for same time		8,536.57
Allegheny National Bank—on ten like bonds .		10,000.00
Coupons for same time		939.68
John Rice—on twenty-five like bonds . .		25,000.00
Coupons for same time		2,347.87
Same on judgment in Franklin county, No. 23 to August Term, 1872.		125,000.00

The several parties interested in the ninety-seven bonds, claimed to hold them for the following items of indebtedness against the Southern Pennsylvania company:

Farmers' Bank of Reading—Two notes of R. L. Jones, indorsed by J. McCarty, for $15,000 each, dated respectively September 25 and October 5, 1871 . . .		$30,000.00
Bushong & Brother—Note, dated August 30, 1871, of J. Glancy Jones and J. McCarty to R. L. Jones, and indorsed by him	$22,600	
Note, dated October 16, 1871, of the South Pennsylvania Company, indorsed by McCarty, J. G. Jones and R. L. Jones; guarantied by Bushong & Brother to J. A. Althouse . . .	15,120	
Note, December 16, 1871, R. L. Jones to H. Maltzberger, and indorsed by him	250	
		$37,970.00
Reading Savings Bank—Note of company, dated July 20, 1871, to R. L. Jones, indorsed by him . .	$5,806.91	
Note of company dated October 17, 1871, to R. L. Jones, indorsed by him .	5,000.00	
Note of company, October 20, 1871, to R. L. Jones, indorsed by him . .	2,669.07	
		$13,575.98

The bonds and coupons were payable in gold.

Daniel V. Ahl claimed to be the owner of eighty of the above bonds with coupons for the same time, which he alleged had been delivered to Messrs. Kennedy & Stewart for him in pursuance of an agreement with the company, of June 4, 1870, and which had been returned to the company without his consent.

On the 7th of December, 1869, D. V. Ahl entered into an agreement with the Southern Pennsylvania Company, reciting the execution of a deed to the company of twenty tracts of land, of even date; that Ahl had placed the deed in the hands of John Evans in escrow, to be delivered upon the condition that the company should give their judgment bond for $50,000, payable May, 1870, the bond to be delivered to Evans on the 11th of same December; also, on or before the 1st of May, 1870, to deliver to Evans $130,000 of the stock and $130,000 of the bonds of the company, the bonds to be paid by one third of the company's profits annually, and at all events to pay him $10,000 annually, with a right to Ahl, in case of default by the company, to enter, mine, etc., with other stipulations not necessary to refer to.

On the 4th of June, 1870, the company, acting by Richard L. Jones, their attorney in fact, entered into an agreement with Ahl, to which the agreement of December 7, 1869, was canceled, the company giving as the consideration $50,000 in cash, $50,000 of the the first mortgage bonds, and eighty bonds of $1,000 each, to be secured by a second mortgage; Ahl to have exclusive use, etc., of the furnace, etc., "as though he had obtained the same by lease, until the 1st day of April, 1871," and upon the surrender of the lease, the company to buy at an appraised value all the personal property on the premises. The deed to the company was delivered. The money was paid, and the first mortgage bonds were delivered to Ahl, on or about June 4, 1870; on the 28th of the next November the treasurer of the company sent the eighty-second mortgage bonds to Kennedy & Stewart, their solicitors at Chambersburg, to be delivered to Ahl; they notified Ahl that they would deliver them to him upon his giving a receipt for them. He declined to receive them, on the ground that they were third mortgage bonds, by reason of the entry

of the judgments before mentioned in favor of Boas and the Farmers' Bank of Reading, complaining that the entry of these judgments was a violation of the agreement. Upon his inquiry, Mr. Kennedy told him the judgments could not be satisfied, and Ahl positively refused to accept the bonds; he repeated the refusal, saying that he acted under the advice of counsel; the refusal was regarded as "final and conclusive." In August, 1871, Kennedy & Stewart returned the bonds to the treasurer of the company on instructions from that officer; of this Ahl was informed, and it did "not appear that he ever made any subsequent demand upon the company for them." The master was "of opinion that the bonds were never delivered to Mr. Ahl, and that he never had any such title to or possession of them as entitled him to a claim on this fund."

The master having expressed this opinion, the counsel for Ahl proposed to give evidence, which was specified, for the purpose of showing that the persons having possession of the eighty bonds had not in equity any claim in the fund against him. The master rejected the offer.

On the 24th of December, 1870, after the execution of the second mortgage, the directors of the Southern Pennsylvania Company passed a resolution reciting the contract with Richmond L. Jones for the construction of the road, to be paid for by $625,000 of first mortgage bonds; that they had subsequently paid $50,000 of those bonds to Ahl in payment for his lands, and therefore to that extent could not comply with their contract with Jones; and that Jones had agreed in lieu of those bonds to receive $75,000 of the second mortgage bonds, and directing the last mentioned bonds to be delivered to him; this was accordingly done. The company afterward issued absolutely three of the second mortgage $1,000 bonds to Henry M. Keim, and ten which became the property of the Allegheny National Bank, leaving $112,000 of the bonds undisposed of. On the 22d of April, 1871, the directors passed a resolution reciting that by reason of many of the subscribers to stock having neglected to pay their subscriptions, the company was unable to meet their obligations, and authorizing Jones to enter into negotiations for procuring individual indorsements and guaranties, etc., to provide for

such obligations. On the 27th of May, 1871, Jones reported to the directors, as the result of his negotiations, that he could furnish indorsements, etc., by which he could procure temporary loans, and they directed the treasurer to issue to him 1,500 shares of the capital stock of the company, "in consideration of the pledging of the credit and private property of individuals for the exclusive benefit of the company"; the treasurer was directed also to deliver to Jones the remaining $112,000 of the second mortgage bonds as collateral security for the temporary loans, etc., to be procured by him; the $112,000 of bonds were delivered to him.

These bonds were delivered as collateral security for loans on the company's notes from the following lenders:

Kensington National Bank	$34,970.50
Reading Savings Bank	14,285.28
Bushong & Brother	15,880.53

These notes were indorsed by Jones and others.

There was also due Jones for money advanced by him at various times a balance of $66,247.72. There were also individual notes under the resolution of May 27, 1871, by which the $112,000 of bonds were to be pledged as collateral, amounting to $61,438.79, leaving $4,808.93 due Jones.

The master was of opinion that the $112,000 of the bonds were issued for a valuable consideration, and that Jones was entitled to their proceeds to indemnify him and those acting with him against liability for indorsing the notes held by the Kensington Bank and Reading Savings Bank, or by pledging private property for the same, and also for the balance due Jones himself; he also was of opinion, and so decided, that the whole amount of the bonds was payable to those who held them as collateral; that there was no resulting interest to the company in them, and that the other creditors had nothing to do with them. The master, therefore, after deducting the expenses of the audit, etc., distributed the fund to those holding the second mortgage bonds, and excluded Ahl's claim and the claim of Rice on his judgment.

Ahl filed a number of exceptions to the report, the seventh was to the exclusion of the evidence offered by him.

Rice also filed two exceptions, the first was that the report was premature, without affording an opportunity for a full investigation of the books, etc.

On the 3d of May, 1873, the court at Nisi Prius, Mr. Justice SHARSWOOD, directed that the stockholders of the company be allowed to appear and produce such evidence as the master may deem relevant and competent; Ahl's seventh and Rice's first exceptions were sustained and the others reserved; the case was referred back to the same master.

The master had his first hearing under this reference May 14, 1873; no new claims were presented except two by the Commonwealth for taxes; the master reported against them. He reported that an examination of the books, etc., under the order made on Mr. Rice's exception, was had and that nothing appeared to alter his conclusions as to Rice's claim, which he had reached in his first report. He reported that the evidence introduced by the stockholders who were represented before him had no relevancy to the issues before him.

As regards the claim of Ahl there was additional evidence, viz.: On the 25th of November, 1870, Maltzberger, treasurer of the company, wrote to Ahl that he had sent eighty second mortgage bonds of $1,000 each, as per Ahl's directions, to Kennedy & Stewart, Chambersburg, "in compliance with the agreement of said company with yourself of June 4, 1870," to be delivered to Ahl on his application. The treasurer wrote on the same date to Kennedy & Stewart, saying he had sent the bonds, describing them, and saying they were sent in pursuance of the agreement of June 4, 1870, as in the letter to Ahl; also, a receipt for Ahl's signature speaking of the bonds in the same way. Also, a letter, August 15, 1871, from Maltzberger to Kennedy & Stewart, directing them that as Ahl had refused to accept the bonds to return them to him. Besides this, and the facts before stated of Ahl having refused to take the bonds, the master reported that before the bonds were returned to the company, Ahl endeavored to enforce his covenant with the company by holding possession of the property conveyed by him to the company, after the time fixed for his holding it "as upon a lease" had expired and, after having been dispossessed by proceedings under the Landlord and Tenant Act, commenced an action at law to recover restitution, the action being still pending; that he knew the bonds had been issued to other persons, and were still outstanding; that without making objection he allowed proceedings to forc-

close the second mortgage, and at the sale gave no notice that he claimed the bonds, but gave notice that the company had no title to certain tracts of land embraced in the mortgage.

The minutes of the company showed that there were $10,000 of the second mortgage bonds issued to C. L. Magee, $3,000 to H. N. Keim, $75,000 to R. L. Jones, and $112,000 were charged to collateral security account; they were disposed of as follows: July 21, 1875, to C. T. Yerkes, Jr., & Co., $15,000; August 23, 1871, to R. L. Jones, $80,000; February 15, 1872, to R. L. Jones, $17,000; the minutes did not show that $80,000 or any other amount of bonds had been issued to Ahl.

By the testimony of W. H. Kemble it appeared that at a conference between himself and others, Jones being one, having reference to the purchase of the company's property, Jones said that Ahl had received $100,000 for the property sold by him to the company, and was to receive $80,000 in the second mortgage bonds, which he had refused to receive as second mortgage bonds so long as the preceding judgments remained unsatisfied.

The master decided that by reason of Ahl's conduct above stated and his having permitted the rights of others to intervene, he had concluded himself from any claim through the $80,000 of bonds.

The master further decided that his own duty was limited solely to distribution among the holders of the bonds under the decree of foreclosure, and that whilst he could determine the ownership of the bonds he could not "adjust the accounts of simple debt creditors." He therefore disallowed Ahl's claim.

The master further reported as to the bonds transferred for the use of the two Reading banks and Bushong & Brothers, as collateral security, that the whole amount of money for which they had been pledged had been advanced to Jones for the company from time to time on his notes. The notes having become due and the company being unable to pay, these creditors agreed to give an extension of time and forbearance for three years upon receiving the second mortgage bonds of the company as collateral, at the rate of 75 per cent. for the whole indebtedness; $97,000 of the $112,000 of the bonds received by Jones were therefore delivered to H.

H. Muhlenberg as trustee for these creditors. The master held that this forbearance was of itself a good consideration; he found that these creditors had no notice of Ahl's claim on these bonds, and were holders for value without notice of any adverse claim.

As to the judgment of Boas and the Farmers' National Bank of Reading, they were entered on bonds and warrants of attorney each conditioned for the payment of the sum of $32,894.82 in two years without interest; the bonds had been executed in pursuance of a resolution of the directors and placed in the hands of A. L. Boyer, a broker of Reading, to whom they were made payable; he disposed of them to Boas and the bank for $25,000 each; and assigned two judgment bonds to them respectively on the 8th of June, 1870; the money was paid by Boas and the bank to Boyer and placed in his bank to the credit of the treasurer of the company; the treasurer paid the $50,000 to Ahl by checks on Boyer's bank before the judgments were entered. Jones had spoken to E. P. Boas and H. S. Eckert in relation to the negotiation of these bonds but the terms were arranged by Boyer. E. P. Boas received $3,000 and H. S. Eckert $5,000 for their services in this transaction. The master decided that the holders were entitled to distribution on the whole amount of these judgments.

The indebtedness of the company to the Kensington Bank, with interest to the day of sale, was $34,970.50; the $65,000 of bonds held by them to secure this, were delivered to them at the time the loan was made by Jones; $50,000 being his private property and $15,000 being part of the $112,000. The master held that this bank was entitled to distribution on the whole amount of the bonds held by them.

Keim, who claimed on three bonds, was secretary of the company; his salary was $2,500 in arrear; the treasurer with the consent of the president accepted a proposition of Keim to purchase three bonds at 83⅓ per cent.; the treasurer gave Keim his check for $2,500 and he returned it to him in payment for the bonds.

There was no evidence to contest the claim of the Allegheny National Bank to the ten bonds held by them; nor that of Rice to the $25,000 of bonds held by him.

The master found that there was no fraud, and reported the same distribution as in his first report.

Exceptions were filed on behalf of the stockholders; by Ahl and by Rice to the master's second report.

The matters excepted to sufficiently appear in the following opinion of the court at Nisi Prius, delivered by Mr. Justice GORDON, December 26, 1873.

"Adopting the principle developed in the case of *McElrath* v. *The Pittsburg and Steubenville Railroad Co.*, 18 P. F. Smith, 37, that the master, in a case like the present, can not go behind the decree of foreclosure to ascertain the *bona fides* of the parties to the mortgage, but is limited to a distribution of the fund raised by the sale, we cut off many of the exceptions to the master's report, and also much of the testimony as irrelevant. Thus, it matters not in the present inquiry, that Jones' contract for the construction of the road should have been $400,000 instead of $600,000, that the stock subscriptions were gotten on false representations, or that Mr. Ahl was to get too much or too little for his land, or that through misrepresentation he was induced to exchange a good security for one that was worthless. None of these things, nor the intention of the directors in executing this mortgage, can now be inquired into; the day for this has gone by. What remains for us to do is simply and only to distribute the fund among those to whom of right it belongs. As there will be no residue after the bondholders and lien creditors are satisfied, it is clear that the stockholders have no interests that need consideration.

"Undoubtedly the master should consider and settle the titles of adverse claimants to the bonds; hence we may first consider the exceptions of Daniel V. Ahl, who alleges that the master erred in not awarding to him the proceeds of some eighty of these bonds or rather the sum of $80,000 produced by the sale under the mortgage. If we understand the general idea contained in his exceptions, it is that the second mortgage was made chiefly for the purpose of securing to him the balance of the purchase money resulting from his sale of lands to the company, and that therefore he had a vested right in the mortgage from the date of its execution. That the tender of the bonds was only a recognition of his pre-existing right, and that his refusal to accept them did not either extinguish or weaken that right. But we hold his position to be untena-

ble in this, that the mortgage was executed, not to secure his purchase money, but to secure two hundred bonds of $1,000 each. How could the agreement of the company to give him eighty of these bonds create a specific lien in his favor in the mortgage itself? Suppose the bonds had never been tendered to him: that the company, in violation of their agreement, had refused to deliver them to him, could he, nevertheless, have recovered his $80,000 through a *scire facias* on the mortgage? We think not. It does seem to us that in such case his remedy must lie, either in covenant upon the agreement, or in a bill to rescind that agreement and restore him to his rights under his former contract. We are at a loss to discern, as alleged by his very eminent counsel, how his case is bettered by his steadfast and persistent refusal to accept of these bonds. It looks to us that this was a fatal mistake that is now past remedy. It is no doubt true that the company acted in bad faith in permitting the judgments Nos. 203 and 204, August Term of the Common Pleas of Franklin County, to precede the execution of the mortgage, but neither does this help Ahl's status with reference to that mortgage.

"It is then to us clear that the master was right in refusing to let him in upon this fund.

"We turn next to the exceptions of John Rice. He complains of the master's ruling in that he allowed the full face of the claims of Augustus F. Boas and the Farmers' National Bank of Reading (the two judgments already referred to), because these claims were in part made up of usurious interest; in other words that these judgments were purchased by the claimants at a usurious discount from one A. L. Boyer, a broker of Reading, to whom they had been executed by the company for the purpose of discount. Now whether these were *bona fide* purchases from Boyer, or were taken with the knowledge that they were confessed to him without consideration from him, and for the mere purpose of sale, matters not. Creditors can not inquire into the good faith of the transaction, unless it covers a fraud intended to affect them. On this the authorities cited by the master are full and to the point. It is also settled that an auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it they must resort to the proper court for that purpose.

"The next exception by Mr. Rice presents the complaint that the master should only have allowed to the Reading Savings Bank, Bushong & Bro., and the Kensington National Bank, the face of their claims with interest, and not the full amount of the bonds which they hold only as collateral security. No doubt this would be so were these collaterals held directly from this Iron and Railroad Company, or from Jones as their agent. But as the master has found, and we think rightly, from an examination of the testimony, that these bonds were issued to Jones for his own security, as well as that of others, in raising money for the purposes of this company, and that he will not be paid by the bonds which he received and deposited with these parties, we can not, under such circumstances, regard the equity of subsequent creditors as superior to that of Jones, and must therefore leave these bondholders to account to their principal for any balance that may be over the amount due to themselves.

"With reference to the bonds held by the Allegheny National Bank, no such circumstances have appeared as would throw upon them the burden of proof of showing that they received them in the ordinary course of trade and for a valuable consideration. These bonds are made payable to bearer, they pass by delivery, and may be sued by the holder in his own name, so that though not technically negotiable paper, they are practically so for all purposes of commerce. We can not, therefore, upon the mere motion of a disappointed creditor, compel the holder of such bonds to prove that they were obtained from the company for a valuable consideration.

"Next came the three bonds held by Henry M. Keim. It is not denied that the company received full consideration for these in the way of his services as secretary. But it is alleged that the treasurer had no authority from the board of directors to issue them. We might answer this exception by directing attention to the fact that the company has found no fault with that act, and it behooves not a stranger to call it in question; nevertheless, whether the acts of the treasurer in this matter were authorized or not at or before the time it was transacted, they were acquiesced in by the directors, and thus ratified: *Kelsey* v. *The Bank*, 19 P. F. Smith, 429.

"We deem it unnecessary to dwell upon the remaining exceptions, as they are substantially disposed of in what has already been said. In conclusion, we think the master has properly disposed of the fund in controversy.

"Report confirmed, and decree to be entered accordingly."

Ahl and Rice appealed from the decree at Nisi Prius to the court in banc.

Ahl assigned for error:

1. Not decreeing to him a sum sufficient to pay him as owner of eighty second mortgage bonds.

2. Awarding to the two Reading banks and Bushong & Brother an amount sufficient to pay the eighty bonds, they not being their owners.

3. Awarding to the Kensington Bank a sum exceeding their debt.

4, 5. Awarding to A. F. Boas and Farmers' Bank of Reading, each $33,908.30.

6. Awarding to John Rice a sum sufficient to pay his twenty-five bonds.

Rice assigned for error: Confirming the report of the master, and directing distribution to be made as stated in the report.

AGNEW, C. J., delivered the opinion of the court, July 2, 1874.

The first subject for consideration is the fund in court. What does it represent? The mortgage under which the sale was made, embraced the entire railroad and all its land, property, franchises, sidings, workshops, stations, depots, machinery, rolling stock, and everything of a tangible nature, then owned or to be thereafter acquired, together with all the corporate rights, privileges, franchises, easements and liberties, then existing or thereafter to be acquired. Thus not only the entire property, real and personal of the corporation, but even its capacity to make other property by its railroad and franchises, passed to the purchasers. By the terms of the act of 8th April, 1861, 1 Brightly, 290, pl. 49, these purchasers became "vested with all the right, title, interest, property, possession, claim and demand in law and equity of, in and to such railroad, with its appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation."

The fund in court, therefore, represents all that was tangible or valuable, belonging to the corporation, leaving it a denuded trunk, possessed of those powers only essential to the settlement of its affairs: *Commonwealth* v. *Central Pass. Railway Co.*, 2 P. F. Smith, 506; *Wellsborough & Tioga P. R. Co.* v. *Griffin*, 7 Id. 417.

It is to this fund, the jurisdiction of this court has attached, and hence the necessity of a full and entire distribution of the fund among all the creditors entitled to it. Jurisdiction having attached, equity comprehends within its grasp all incidental matters necessary to enable it to make a full and final distribution, and, therefore, to terminate litigation, while it affords a perfect remedy: *Souder's Appeal*, 7 P. F. Smith, 502. Hence, in *Kelly's Appeal*, 4 Harris, 59, in a question of distribution, involving partnership property and individual creditors, Judge BELL said: "The objection that the court or auditor had no power to state an account between the partners, is met by the answer, that the distribution of the proceeds of sheriff's sales is to be determined according to law and equity, and it can not be questioned that in such a case a chancellor from necessity would direct an account to be taken." See also *Overholt's Appeal*, 2 Jones, 222. The doctrine is precisely the same in regard to distribution among creditors and others, in the Orphans' Court. "The power," says LEWIS, C. J., "to decide all questions necessary to a proper distribution of the fund, follows the power of distribution, and vests in the Orphans' Court as a necessary incident to the jurisdiction": *Bull's Appeal*, 12 Harris, 288; *Kittera's Estate*, 5 Id. 416. He states this further proposition: "The right of each (claimant) to be heard in support of his claim, and in opposition to every claimant who interferes with it, is necessarily involved in the right to demand payment out of the fund." See also *Dundas' Appeal*, 23 P. F. Smith, 474. It was, therefore, a grave error, on part of the master, instead of distributing the entire fund among the several claimants according to their rights, to award to the counsel of the Farmers' National Bank of Reading, the Reading Savings Bank, and Bushong & Brother, the sum of $109,771.24, representing ninety-seven second mortgage bonds, and their overdue coupons, and a like error to award

to the Kensington National Bank $73,536.57, representing sixty-five second mortgage bonds and their overdue coupons. He should have awarded to the several parties named, the actual amount of their real debt, with interest to the day of sale, and the excess should have been distributed among the other creditors according to their rights. The effect of leaving this excess in the hands of these creditors, who held the bonds as mere collaterals, was to ignore both the jurisdiction and the duty of the court, to make distribution of the entire fund in its hands according to law and equity. The error of the master was, in assuming that Richmond L. Jones would be entitled to this excess which would pass into his hands from these creditors, who had received the bonds through him, as collateral for the company's debts. But the right of Mr. Jones to participate in the fund against other creditors, and especially against Daniel V. Ahl, is one of the important questions in the distribution.

This brings us to consider the claim of Mr. Ahl, to eighty thousand dollars for purchase money, and his right to receive the same out of the fund in court which was produced by a sale under the second mortgage of $200,000. The battle before the master appears to have been fought over the question of the delivery of eighty bonds, from No. 1 to No. 80, inclusive, set apart by the railroad company for Mr. Ahl, and sent to Kennedy and Stewart, attorneys of the company, for delivery. These bonds were not delivered to Ahl, and were recalled by the company. On this ground the master thought that Mr. Ahl was not entitled to participate in the fund. But he misconceived Mr. Ahl's claim. It did not rest on a sale and delivery of so many bonds, but on his prior right to so much money as these securities represented. It is because in equity he was by the terms of his antecedent contract, the owner of so much of the mortgage which was raised under the terms of that contract to secure payment to him of the remaining $80,000 purchase money. He was therefore entitled to a place in the distribution of the fund produced by that mortgage unless a higher equity in third parties has supervened. A short statement will exhibit the nature and the equity of his claim. He was the vendor to the company of the property from which the fund has been

produced. By the terms of his first agreement of sale, December 7, 1869, his deed to the railroad company was held in escrow in the hands of a third person as a security for their compliance with the terms of sale. The company found it necessary for their purpose to have the title absolutely in themselves, and came to a new arrangement with Mr. Ahl, on the 4th of June, 1870, whereby he released his title to them and they agreed to pay him $50,000 in cash, instead of the judgment of $50,000 in the first agreement, and to deliver him $50,000 in first mortgage bonds and $80,000 in second mortgage bonds, in lieu of the $130,000 of stock and of $130,000 of bonds in the first agreement.

By the terms of the agreement of the 4th of June, the company were bound, within sixty days, to execute a second mortgage, not to exceed in amount $200,000, and to deliver to Ahl eighty one-thousand dollar bonds, secured by his mortgage. This mortgage was not a thing *in esse* for which the parties were bargaining, but it was to be created as the means of securing the sum of the unpaid purchase money. The agreement of the 4th of June, 1870, was, therefore, to the extent of the $80,000 of purchase money, a deed to lead the use of the mortgage and not a mere agreement for a purchase. As soon as the mortgage was executed, Ahl's right attached to it in equity by virtue of the prior agreement to lead its use, as to so much of it. The money represented by this portion of the mortgage and the bonds, was his. It never belonged to the company. He had parted with his title on the express condition of the security of the second mortgage. His part had been performed, and in equity his right attached immediately. To this extent the bonds accompanying the mortgage were his, and they were actually numbered and set apart to him; *vide* Treasurer Maltzberger's letters to Ahl, of 28th November, 1870. As between him and the company it is clear the latter had no right to withhold them, and could not by their breach of good faith, in placing upon the property an intervening incumbrance, make his refusal to accept the bonds, until the incumbrance was removed, an excuse to transfer them to others. When they afterward handed them over to R. L. Jones, they were guilty of a breach of trust, and he, with a full knowledge of the facts, as

the evidence clearly proves, gained no title to them. Ahl had a right to demand that the judgments should be removed before the company could be entitled to claim a full performance of their agreement. Even a tender refused by him on this ground would not change the ownership of so much of the mortgage and bonds; to be effectual the tender must be kept up, and if an admission of ownership—Ahl's refusal, on the ground of the actual bad faith of the company, did not change his title in equity to the security of the mortgage, as the stipulated protection for his purchase money.

Hence the resolutions of the company of the 26th of December, 1870, and 27th May, 1871, under which the master finds that the bonds went into the hands of R. L. Jones, were ineffectual to transfer title to him, unless he had been a *bona fide* purchaser for value, without notice of the rights of Mr. Ahl. But unfortunately for Mr. Jones, on the question of notice, there is not a shadow of doubt. He was himself the party, as attorney in fact, for the company who made the agreement of the 4th of June, 1870, and signed it as such attorney. He knew precisely what the rights of Mr. Ahl were. W. H. Kemble's testimony also brings home notice to him, and in addition we have the significant fact that the treasurer recalled the bonds from Kennedy & Stewart, by letter of the 15th of August, 1871, and on the 23d of the same month they were handed over to Jones, and the further fact, that Jones was the *factotum* of the company. These bonds are next found in the possession of the Farmers' Bank of Reading, the Reading Savings Bank, and Bushong & Brother, placed there by R. L. Jones, as collaterals for the security of overdue debts against the company, and Jones and others. In the present state of the law, it must be conceded that railroad bonds, such as these, pass by delivery, and are protected in the hands of *bona fide* holders for value without notice, in the same manner as negotiable paper. Whether these Reading parties are such *bona fide* holders for value, is not altogether clear. The master thought there was a new consideration, to wit, forbearance. The question, however, merits further inquiry. We have already adverted to the fact that these Reading creditors and the Kensington National Bank, even if *bona fide* holders, can draw from the

fund only the real amount of their debt and interest, and not the whole amount of the bonds held as collaterals, and that the surplus must be distributed among the other creditors entitled to participate in the fund, whether Jones or Ahl, or others. Besides, some of these creditors hold other collaterals for the same debts, received from R. L. Jones, who under the facts may be compelled to suffer other creditors, claimants on the fund, to be subrogated to these securities, or, which is the same thing, that these securities shall extinguish so much of the debts for which he placed the second mortgage bonds as collaterals along with them. This is a proper subject of inquiry in making a new distribution. The principle of equitable substitution which displaces one lien creditor to make way for another, lower in the list, by reason of a superior equity in the latter, is one often acted upon. See the following cases: *Erb's Appeal*, 2 Penna. 296; *Himes* v. *Barnitz*, 8 Watts, 39; *Worrall's Appeal*, 5 Wright, 524; *Barnes' Appeal*, 10 Id. 350. It is therefore a proper subject of inquiry, how far R. L. Jones, in pledging the bonds equitably belonging to Mr. Ahl, with a full knowledge of his rights, will not be postponed to him; and how far other collaterals, pledged along with these bonds, will not be required to exonerate these bonds, if found to be in the hands of *bona fide* holders for value. The argument so vehemently pressed that Mr. Ahl has received enough for his property, can not be countenanced in a State where contracts have the protection of constitutional sanction. Courts can not make new contracts for litigants. Under the agreement of June 4, 1870, the $80,000 of purchase money is entitled to the same protection that is given to the first dollar paid upon the property.

The decree of the court of Nisi Prius is reversed, and it is ordered that the case be referred to another master, with leave to take further testimony, if required by the parties—the testimony on all sides to be closed by the 1st day of November next, and report to be made on or before the first Monday of January, 1875. The master to report the facts and make a new distribution of the whole fund, according to the principles set forth in the foregoing opinion; and George Junkin, Esq., is hereby appointed examiner and master for the purpose.

And it is further ordered, that the master inquire into and report the facts in relation to the two judgments in the name of Amos L. Boyer, for use, aggregating $65,789,64; that is to say, whether the money advanced by the assignees of Boyer was by way of loan or purchase; and if a loan, how much money was lent upon the same, and how much of the sum of the said judgments was usurious interest; reserving for the opinion of the court the question, whether the creditors entitled to the fund can inquire into the question of usury, for the purpose of striking from the judgment and interest so much of the same as shall be found to be usurious?

Mr. Junkin sat on the 4th of August, 1874, and subsequently. A number of stockholders were represented at the various meetings; there were laid before the master judgments against the company for land damages, viz.: Abraham Keefer, December 18, 1872, for $1,500; David Teeter, April 18, 1873, for $1,200; Jacob Friese, Nov. 3, 1873, for $1,712.75; also judgments, W. & A. Burgess, January 25, 1873, for $6,000 on a note; James Giles, April 26, 1873, for $606.89 on an acceptance; and several other claims.

Besides the facts found by the former master, it further appeared by the report of Mr. Junkin as follows:

At a meeting of the stockholders, March 4, 1869, after the election of the first board of directors, a general resolution was passed giving the directors authority to do everything that the company were authorized to do. Jones did not become an officer because he was to have the contract for building the road, nor Ahl, because he was to sell his land to the company. The contract with Jones to build the road was made without any survey having been made; Jones did not expect to do it, but to sublet it, which he afterward did.

On the 12th of March, John Evans, the confidential clerk and man of business of Ahl, subscribed for ten shares and was elected a director.

The president and the four directors were not expected to pay for their stock, nor did they ever pay for it; they were elected to represent Jones and Ahl, and carry out their plans. The president and two directors, who resided in Reading and held forty shares of the stock, gave their checks for $4,000,

the amount of their subscriptions; these checks were afterward returned to them, and the amount charged as expenses incident to organization. About March 16th, no definite arrangement having then been made for the purchase of the land, public meetings were held at Mercersburg and elsewhere in the vicinity of the route of the road, for the purpose of inducing subscriptions. Jones spoke at these meetings, and, without asking the people to subscribe, his statements were such as to induce them to believe that he and those acting with him were able to construct the road. Subscriptions to the stock exceeding $125,000 were procured by Ahl and his associates; on these subscriptions about $69,000 were subsequently paid. April 17, 1869, Jones contracted to build furnaces for the company; for this he was to receive 2,000 shares of full paid stock, 200 of first mortgage bonds of $1,000 each intended to be issued, and $50,000 in money.

On the 26th of April, 1869, Ahl made a deed to Jones for one half the land on which the company was to be organized, Jones giving him a bond for $50,000, which was to be paid as Jones should receive it from the company under his foregoing contract, and also $10,000 of the stock. Jones insisted on this conveyance as a guaranty that the enterprise would be carried on, to satisfy those who were to assist him in money matters. Afterward the supplement changing the name of the company was passed, and Jones set the engineers to work to prepare for building the road; these and other expenses Jones paid, the company having no funds, as the subscriptions by outside parties were upon the condition that the road should be constructed to Mercersburg.

Up to the middle of August, 1869, Jones and Ahl acted together in harmony; then Ahl by letter complained to Jones of the slow progress of the work. Jones's reply showed that the delay was for want of money, and that the understanding was that the $50,000 cash payment for the land was to be made from outside subscriptions for stock. On 24th August the directors resolved to call in the stock subscriptions. Up to this time there had been no absolute agreement as to the conveyance of the land; other land had been articled for and leases to Jones and Ahl procured. Under the agreement of

December 7, 1869, referred to in the first master's report, the company was not to issue in the aggregate more than $855,000 in bonds, and none of them were to have a claim or lien paramount to the 130 bonds to be issued to Ahl; at the same time Jones gave to Ahl a written agreement that the company should not enter the deed of December 7, 1869, held by Evans in escrow, for record until after two weeks' notice to Ahl, and six tracts of land were to be reconveyed to Ahl; the deed to Jones of April 26, 1869, for half the land was handed back to Jones, the furnace contract abandoned, and the bond of Jones for $50,000 was canceled. On December 14, 1869, the company executed an ordinary judgment bond to Ahl for $130,000, payable with seven per cent. interest on the 14th of December, 1877, and reconveyed to Ahl the six tracts; this left in the company about 3,690 acres. On the 24th of December, 1869, the directors instructed the treasurer to pay R. L. Jones $10,000, "in repayment of money advanced by him from time to time to the company, and for his expenses incurred in the company's service."

On the 20th of January, 1870, Ahl's deed was delivered absolutely to the company, and the $130,000 bond, the stock and the deed for the six tracts, delivered to Ahl. He entered judgment on the bond in Franklin county on the 22d of January, 1870, and recorded the agreement of December 7, 1869; it was intended to be recorded; Ahl's deed to the company was recorded April 19, 1870. May 1, 1870, the time when Ahl's $50,000 judgment bond would be due, he applied to Jones for payment; Jones declined to pay unless Ahl would cancel the agreement of December 7, 1869, telling him that the agreement did not express their original understanding, but that Ahl had taken advantage of the circumstances in which Jones had been placed to enforce its execution. The recording of the agreement had brought it to the notice of Mr. Watts, president of the Cumberland Valley Railroad Company, who had been advancing money to the Southern Pennsylvania Company under their agreement; he refused to advance any more money unless the agreement of December 7, 1869, was canceled. This brought about the agreement of June 4, 1870, heretofore referred to, by which, amongst other things, Ahl was to receive $80,000 in second mortgage bonds. In order

to pay Ahl's judgment, the company had authorized the president to borrow $75,000 on the company's note, with judgment bond and pledge of the corporation bonds as security. To raise this money Jones commenced a negotiation with the Farmers' National Bank of Reading, of which H. H. Muhlenberg was cashier, and the Reading Savings Bank, of which E. P. Boas was cashier, and his father, A. F. Boas, president; E. P. Boas was also a director of the Southern Pennsylvania Company. To cover the usury to be paid, the company executed to Boyer the judgment bond mentioned in the first master's report, and two notes, dated June 1, 1870, to the order of McCarty, their president, for the same amounts; these notes were indorsed by McCarty and Jones; one of the notes was discounted by each of the banks, and the proceeds, $28,957.54 in the Savings Bank and $28,947.41 in the Farmers' Bank, credited to Boyer; the discount was taken from these sums, and but $25,000 on each note paid to Boyer, who was to be paid for his services one fourth of one per cent. The master found that the company owed him nothing; that the transaction was a loan to the company by the banks of $25,000 each for two years. Jones went to Chambersburg, and on June 4, 1870, paid Ahl by the treasurer's checks $38,956, which was credited on his judgment, delivered to him the $50,000 first mortgage bonds, and the agreement for changing their arrangements was concluded; the judgments assigned to Boas and the bank were entered in Franklin county June 9, 1870. The balance, $11,544, of Ahl's judgment, was paid July 16, 1870. Jones's action in these matters was approved by the directors at a meeting June 25th. Ahl wrote to the secretary for the $80,000 of bonds on the 2d of September, 1870, and again on the 25th of October, 1870. He knew of the entry of the judgments in the last week of October, 1870, but there was nothing to show that he knew it before. The circumstances of the offers and refusal of the bond are substantially stated in the first master's report, with this in addition, that about that time, he asked Kennedy & Stewart, the solicitors of the company, to use their influence with the company to have the judgments removed; they informed him that Mr. Jones said it could not be done. Ahl continued in possession of the furnace, carrying it on under his contract of June 4, 1870.

About February 19, 1870, the St. Charles Iron Company was incorporated; there were seven corporators; stock to the amount of $100,000 was subscribed, but none was ever paid for. Most of the corporators were in some way connected with the Southern Pennsylvania Company. R. L. Jones was the president. George Rice, one of the directors, was one of the sub-contractors of Jones for the building of the Southern Pennsylvania road. The "improvements" contemplated by the company were building a railroad from the road of the Southern Pennsylvania Company through their land to their ore-banks, and the various apparatus to prepare the ore for market. George Rice was to make these improvements for $75,000. He was to pay for them, the other stockholders to be credited on their stock for this amount, Rice to get $25,000 of stock for nothing; and to be reimbursed for his outlay by being permitted to mine a certain quantity of ore. No money was ever paid into the treasury; no contract was made by Rice with the St. Charles Company, but the arrangement was by an "understanding" between him and the officers of the Southern Pennsylvania Company. On the 19th of November, 1870, the two companies made a contract by which the St. Charles company was to mine and prepare for the market, iron-ore not exceeding 20,000 tons per month, and deliver it on the Southern Pennsylvania Company's road, for which that company were to pay them $1.50 per ton; the St. Charles to have the right also to mine for their own furnaces at fifty cents per ton. Rice commenced the improvements in the winter of 1871—1872. On the 5th of January, 1871, Jones sold twenty-five of his seventy-five second mortgage bonds to George Rice, and on the 14th of March, 1871, the remaining fifty bonds were issued to Jones.

At a meeting of the directors of the Southern Pennsylvania Company, January 28, 1871, one item of the treasurer's report was:

"$1,000 second mortgage bonds for D. V. Ahl, now in the hands of Kennedy & Stewart, $80,000."

The treasurer's report was accepted and approved.

When McCarty and Jones, on the 1st of April, 1871, went to take possession of the furnace property, Ahl refused to surrender it saying that he had not been paid for the property and

he intended to hold it. Jones replied that he had been paid, the bonds were in the hands of Kennedy & Stewart, and he could get them at any time. The president brought the workmen from the railroad and took possession by force of the furnace and its appurtenances. Ahl remained in possession of the mansion house and all the other buildings. He was afterward dispossessed by proceedings under the Landlord and Tenant Act, the writ of possession having been executed May 9, 1871.

A *certiorari* to the justice's proceedings was issued. One of the exceptions to the proceedings was that the relation of landlord and tenant did not exist. The *certiorari* was still undisposed of. McCarty and Jones were afterward convicted in the Quarter Sessions of forcible entry.

The work on the railroad continued to progress; the bonds and stock were issued by Jones on his contract; passed away by him to others; the coupons became due; engineering expenses were to be met, and money to be raised for these matters. "Jones was in fact the company; the directors from the first had been put there by him and Ahl, and all the details of the business and the acts of the company had been prepared by him, and ratified by the directors as and when he requested it."

When Jones was seeking for money to pay the matters just mentioned, he applied to the Farmers' Bank of Reading, which was one of the State treasurer's depositories. The officers of the bank said they were not in funds to accommodate him, but would if they had funds. Jones then requested the State treasurer to deposit funds there; he did so. It was afterward agreed with the treasurer that he, the treasurer, should have some of the corporation bonds; by his direction $100,000 of the second mortgage bonds were issued to C. L. Magee for him, "as commission on sundry temporary loans." These bonds are those claimed by the Allegheny Bank.

On the 27th of May, 1871, the president was authorized to execute an instrument "for securing the payment to C. T. Yerkes, Jr., of a certain sum of money, being the amount of certain bonds which said company have agreed to purchase from said Yerkes on July 22, 1871, and also a warrant of attorney for confession of judgment in his favor in case of non-

payment by the company." This was but a mode of covering usury for the loan of money. The loan had been made by Yerkes to Jones on notes, with company second mortgage bonds as collateral. Yerkes afterward borrowed money from the Kensington Bank and gave the notes and bonds as part of the collateral security for the loan. Yerkes could not state the rate of discount which he charged Jones, "but it was more likely over than under one per cent. a month."

Jones, on March 11, 1871, obtained on his note for $30,000 to his own order a discount from the People's Bank of Philadelphia. The proceeds were used by him for the company. As this note approached maturity, June 12, 1871, the bank discounted the company's note for $40,000, indorsed by McCarty, R. L. Jones and J. Glancy Jones, his father; $30,000 of the proceeds were applied to payment of the first note. Jones drew the balance and used it for the company. Both the notes were discounted at one per cent. per month. The mortgage bonds remained in the bank as collateral for this note, which on October 14th, was protested for non-payment. To meet this note, Jones raised money as follows:

Isaac Althouse discounted the company's note, dated October 16, 1871, for $15,120, payable in four months, to the order of Jones, indorsed by him, McCarty and J. G. Jones, and guaranteed by Bushong & Brother. Bushong & Brother took up this note on their guaranty and continued to hold it. Jones had his own note for $15,000, dated October 5, 1871, with McCarty's indorsement, discounted at the Farmers' Bank of Reading. A company's note, dated October 17, 1871, indorsed by him, for $5,000, and a similar one for $2,667.07, were discounted by the Reading Savings Bank. Jones' own note for $5,333.33, dated October 31, 1871, was discounted by Bushong & Brother; it was secured by his judgment bond for the same amount to Baer, their counsel, who at once assigned it to them. The proceeds of these notes were $40,002.40, and were applied to take up the note in the People's Bank. Jones had his own note of September 17, 1871, for $15,000, discounted by the Farmers' Bank of Reading, and applied the proceeds to use of the company. To secure these parties McCarty and Jones executed two judgment bonds to H. H. Muhlenberg, as trustee for them; one was for

$35,197.77, and the other for $52,850; judgments were not entered on these bonds.

In relation to the return of the $80,000 of second mortgage bonds, and the bonds held by Keim, Mr. Junkin found substantially as the first master.

Jones borrowed from Yerkes, as before stated, on two notes drawn by McCarty and J. Glancy Jones, indorsed by him, and amounting together to $33,881.53; as collateral security he deposited sixty-five of the company's second mortgage bonds. Yerkes passed these notes and bonds to the Kensington Bank as security for a loan made by that bank to him. In thus receiving the bonds the bank had "no knowledge of any kind affecting the integrity of these bonds." When the notes matured, October 26th and 27th, 1871, they were renewed by the bank taking the company's notes for $25,000 and $8,000; these notes were renewed by notes falling due about January 1, 1872, the same collaterals remaining with the bank; $881.53, the difference between these notes and the original notes, and also the discounts on renewals, were paid by Jones. All the money received by him from Yerkes was used in payment of the company's debts.

To meet maturing coupons of the company, Jones procured Bushong & Brother to discount his note for $22,600; the coupons came to $250 more than the proceeds of the note; for this Jones gave them his note, which they still held. The Reading Savings Bank, July 21, 1871, discounted for Jones, the company's note for $5,806.91; the proceeds were used in paying the company's debts.

On the 24th of February, 1872, the directors authorized the treasurer to advance money to the St. Charles Company as the president might direct.

About January 22, 1872, the notes of September and October, 1871, not having been paid, negotiations were had between the Reading banks, Bushong & Brother, the Kensington Bank, their respective counsel and the indorsers of the notes. The makers and indorsers wanted time. Jones then had the eighty bonds which had been set aside for Ahl, and seventeen of the two hundred which remained undisposed of; these he proposed to hand over to the banks. Mr. Baer, who was of counsel with the Reading banks and the Bushongs,

asked him for his authority to dispose of them; he then produced certified copies of the resolutions of April 22d and May 27, 1871, authorizing him to use the bonds for raising money for the use of the company. Neither Mr. Baer nor any of those whom he represented had any knowledge of the transactions with Ahl in relation to the eighty bonds. All the parties but the Kensington Bank then entered into an agreement by which McCarty, J. G. Jones and R. L. Jones, parties of second part, were to confess a judgment to H. H. Muhlenberg in trust for these creditors pro rata; the creditors to hold the collaterals they already had; the second mortgage bonds to be given to the trustee at seventy-five per cent. as collateral to secure the indebtedness and to deliver to any creditor who might desire bonds at seventy-five per cent. in payment of his debt; to pay to trustee twenty-five cents per ton for one half the iron-ore mined on the company's lands; the creditors, to have the right to sell the bonds in payment of the claims, but not for less than seventy-five per cent. during the first year; no execution nor final process of any kind to be issued for three years, unless upon a statement, which the trustee had the right to demand at the end of the year, it should be found that the security had been impaired, when on thirty days' notice he could cancel the agreement and sell the collaterals; during the three years none of the real estate and other property of the parties of the second part should be disposed of by the company, or converted except for expenses or in discharge of liens, and then the surplus to go to the trustee, and any violation of the preceding clause to work a forfeiture of the agreement, and the creditors might proceed at once to sell the securities and collect the money due. To the agreement was appended a statement of the property of the several parties. The Kensington Bank thought best not to join in the foregoing agreement, but the president assured the other parties that the bank would not interfere to defeat it; the parties to the agreement, therefore, further agreed that if the bank or other holders of the collaterals should take steps to collect their claims so as to defeat the object of the agreement, the party of the first part might cancel it and take such steps as they chose. The ninety-seven bonds were, February 17, 1872, delivered to the trustee under the agreement, but the judg-

ment bonds were not given. The company failed to pay the coupons of March, 1872, on the bonds of both mortgages, and the holders threatened to foreclose the first mortgage.

The account of Jones in the ledger of the Southern Pennsylvania Company, showed a balance in his favor of $66,247.72. His credits included the amounts claimed by the Reading banks and Bushong Brothers. Amongst the credits were these items also:

"1871, March 2d. For money advanced and expenses incurred by him to December 24, 1869, as per resolution of the directors of that date for $10,000. Of this amount $2,781.56 cash advanced to the company to said date, December 24, 1869, has already been passed to his credit, leaving a balance due him for this transaction . . $7,218.44.

"July 22d. By bills payable for paying company's note to H. J. Eckert, paid this day . . . . . $5,000.

"1872, April 24. By contingent expenses for order received from R. L. Jones on treasurer of company, signed E. P. Boas, and dated April 24, 1871, being the full amount due Boas for commissions . . . . . $3,000."

George Rice was unable to complete the road of the St. Charles Company; he had expended about $32,000, and contracted debts; his father, John Rice, had lent him money, but was in no way connected with the contract. In consequence negotiations were commenced between John Rice and the companies; they resulted in an agreement, made April 23, 1878, between him and the St. Charles Company, by which he agreed to assume the contract of George Rice, to save the parties from all liabilities to George, etc., John Rice to have the right to mine 200,000 tons of iron-ore, using the machinery, etc. There was also a modification made in the contract between the two companies, and the contract of John Rice was approved; the directors of the Southern Pennsylvania Company also assented to John Rice mining "225,000 tons of iron-ore without payment of royalty in consideration of the obligations and covenants assumed" by him.

On the 25th of May, 1872, the directors of the Southern Pennsylvania Company authorized Jones "to sell the one hundred and twelve bonds at public or private sale and apply the proceeds to the payment of the loans made or procured to be made."

On the 8th of June the contract with Rice was further modified so that he was to afford facilities to enable the St. Charles Company to deliver 7,000 (instead of 20,000) tons a month to the Southern Pennsylvania Company. John Rice commenced and was progressing with the work under George's contract when proceedings on the mortgage were commenced.

During the summer of 1872 various unsuccessful efforts were made to extricate the Southern Pennsylvania Company from its embarrassments. Ahl then learned, if he had not before, "that the eighty bonds were in the hands of other parties as collaterals. He expressed regret that he had not taken the bonds, and said he had been badly advised. He does not seem at any time after he had refused to accept them, to have claimed them as his. * * * It became evident that the company's road and franchises would be sold under one or other of the mortgages."

On the 13th of August, 1872, all the contracts between the two companies, and between them and John Rice, were canceled; and it was agreed that a judgment should be confessed by the Southern Pennsylvania Company in favor of John Rice for $125,000, payable in sixty days in full of all his claims, including his right to mine 225,000 tons of ore; his expenditures were not then ascertained; the railroad he was to construct was completed that fall; his actual expenditures, including those of George, were $103,711.79, to which Rice added a commission of fifteen per cent., making his whole bill $118,789.51, with interest. The $125,000 judgment was entered in the Court of Common Pleas of Franklin County, August 19, 1872. The purpose of this arrangement was to give Rice a lien on the Southern Pennsylvania Company's property before a sale should be had under the mortgage. John Rice had also become the owner of the twenty-five second mortgage bonds sold by Jones to George Rice.

At the sale of the road there were but two bids; one on behalf of the Reading banks for $300,000, and the other for $305,000 by John Rice.

The master disallowed the claims of the Commonwealth, those for land damages, and that of the Allegheny National Bank, for reasons stated in his report.

With regard to the claims of the Reading banks, he held

that the judgments given to Boyer and assigned to them were mere covers of usurious interest, and that they were entitled to receive no more than the amounts actually lent, viz.: $25,000 each, with interest. He allowed the claim of John Rice on the twenty-five second mortgage bonds. He allowed the claim of the Kensington bank on two notes of $25,000 and $8,000, respectively, with interest. He held that the bank held the sixty-five second mortgage bonds *bona fide* for value, and were entitled to be paid the amount of their claim from their proceeds.

As to the claims of the Farmers' Bank of Reading, the Reading Savings Bank and Bushong & Brother, the master held that they received the bonds *bona fide*, without notice of any claim which Ahl had upon them; and in consideration of forbearance and giving time, under the agreement of January 22, 1872, consummated by the delivery of the bonds, February 17th, which was a sufficient consideration, although given as collateral for an antecedent. He found also that the agreement did not include the Bushong judgment for $5,333.33 and Jones's note to them for $250, nor Jones's note to the Savings Bank for $5,806.91. He held, however, that as the resolutions of the directors gave the bonds to Jones to use as collateral for money to be raised by him for the company, and as the money represented by these three claims was for the use of the company, the collaterals to the extent for which they would be liable to Jones should be applied to those debts as if the money had been due to him. He held, however, "for reasons to be stated," that Jones could not claim the bonds, and therefore he excluded these claims from distribution; he allowed the other claims of these parties.

The master found that Rice's judgment was a valid debt.

As to Jones's individual claim, as appeared by the books, the master reported: "A bookkeeper was employed and kept the books; Mr. Jones had no hand in them except a general oversight. The books appear in the main to have been fairly kept. They were thoroughly and exhaustively examined by a professional accountant of no mean skill, and no serious defect has been shown. * * * The master is unable to see anything in his management of the details of the company's business to show that Mr. Jones intended to do wrong

or defraud any one. He did things which a strict and proper morality condemns. * * * His account on the books of the company developed a few matters which were the subject of objection, and must be passed upon. It includes, of course, many of the loans procured by him from the various parties whose claims have been heretofore considered. These being paid, are, of course, to be stricken from his account, should it become necessary to state the account accurately. In addition to these there are other items. The directors, at a meeting heretofore mentioned, voted to him $10,000 for expenses paid by him in the organization of the company. For a portion of these, items were stated subsequently, and the same were entered upon the books in detail. After this, there is a mere lumping credit given in one sum of $7,218.44. No items were given in the books, nor was he able to give the items when examined; merely saying that he had expended moneys to a large amount, and setting forth, in a general way, their character. This, the master thinks, is inexcusable. It was his duty to have kept an account and the vouchers. He has neither. This item must be stricken out."

Referring to the payment of $5,000 to H. S. Eckert for his services, the master said:

"In the opinion of the master, the payment was wrong, and ought not to have been made or received, and must be disallowed. A similar payment of $3,000 was made to Mr. E. P. Boas for similar services. Mr. Boas was a director of the company, and cashier of the Savings Bank, of which his father was president. This was manifestly wrong in both, the payer and the receiver, and the payment must be disallowed. * * * The books examined by the accountant show a balance due Mr. Jones of $66,247.72. If from this are stricken out the amounts which will be awarded out of this fund to the banks and Bushong & Brother, and also these items just referred to, Mr. Jones will be in debt to the company."

As to the claim of D. V. Ahl and R. L. Jones: "In the view the master takes of these claims, they must be considered together. The case as now presented as to both of these gentlemen, is very different from that before the former

master and the court. Then it was simply that of a person selling lands to a corporation, and its agent bargaining with him, each endeavoring to make the best bargain. Now we have the whole history of the transaction from beginning to end, and it exhibits facts which may almost be said to be agreed upon; certainly they are to a very large extent indisputable.

"Mr. Ahl and his brother owned these 5,400 acres of lands, to which they desired a railroad to be built, in order to enhance their value and develop the same. They also owned others in the vicinity. * * * From all the evidence submitted, $100,000 is probably their full cost. In his first negotiation with Mr. Jones and others, D. V. Ahl put the price of all the 5,400 acres of land at that sum. Mr. Ahl really was the Caledonia Company. * * * He and Mr. Jones then agreed to breathe life into this charter, and to use the corporation to make individual profit out of Mr. Ahl's lands, and a railroad to be built to it. The one was to put in the lands and the charter, and the other was to raise the money to build the road. Mr. Ahl was to get control of all the stock, or a sufficient part to govern the corporation; he was never to pay for any of the stock, and he was to sell his lands to the company at a price which he and Mr. Jones should agree upon, and Mr. Jones was to have the contract for the road at a price Mr. Jones and he should agree upon. This scheme was carried out. * * * He and Mr Jones did not become directors, because the one was to sell the lands to the company, and the other was to have the railroad contract. Immediately, without any surveys, or estimates, or examination by any director to see if it was a wise and prudent contract for the company, before the *termini* of the road were known or fixed, the contract was made by the directors with Mr. Jones, that he should build the road for $625,000 in bonds and $625,000 in stock, full paid. As yet the company had no money or lands. Mr. Ahl agreed to this contract. From these terms Mr. Jones did not subsequently at any time vary.

They then set to work to get outside subscriptions to this stock by *bona fide* subscribers. In order to induce parties to subscribe, Mr. D. V. Ahl put down in the subscription book

his name and his brother's for one hundred shares, although it had been distinctly agreed between him and Mr. Jones that he should not pay for it, and so, likewise, that he should not pay for any of the other stock transferred to him. He says that he did all this for Mr. Jones. Even if this were so, it does not lessen the deception practiced upon the genuine subscribers. * * Neither of them revealed the fact that the railroad contract had already been signed, and that Mr. Ahl was to sell his lands to the company. * * But when the enterprise looked as if it would succeed, Mr. Ahl insisted upon different and better terms for the land. And it is very evident that Mr. Jones agreed to the terms of the contract of December 7, 1869, very reluctantly. But were he alone to be considered, this would be wholly immaterial. Parties must abide by their written contracts. On December 7, 1869, however, other parties had rights, and the future creditors and stockholders had rights which required to be respected and protected. On that day Mr. Ahl himself virtually was the company—the directors were his directors—Mr. Jones was their *agent;* and it really was nothing more than a contract between these two; and it was in furtherance of their individual scheme and for their individual profit. Neither of them was endeavoring to take care of the interests of the future stockholders and creditors. Mr. Ahl by that contract secured for himself much more than he originally asked for his lands, or than they were worth. * * It is no answer to say that Mr. Ahl was dealing with Mr. Jones and his associates. He was not. He was dealing with himself, then the only stockholder of the company; or if not that, with a corporation whose directors he had elected for the very purpose of carrying out a secret scheme to enrich himself and Mr. Jones. Was this a compliance, in letter or spirit, with that section of the charter which allowed payment for stock 'at a *bona fide* valuation, to be agreed upon by a majority of the subscribers and stockholders.'? * *

"All this, and much more, demonstrates that it was a *joint* speculation, and that the corporation was a mere means they used to accomplish their private ends. Their true relations to the enterprise and the company they studiously kept to themselves, and absolutely concealed from the outside public whom

they were endeavoring to, and did induce to invest their money in the company. The main features of the enterprise were agreed upon by both. The details were managed by Mr. Jones through the directors. And it may be said generally, that *they* were merely his instruments in carrying forward the whole subsequent movements of the company. All of its action was prepared and molded by him. When the agreements of June 4, 1870, came to be made, he settled the terms of that contract with Mr. Ahl. Had Mr. Ahl been dealing with Mr. Jones alone, or with the company as mere independent vendor and vendee of lands, the principles laid down by the court in its opinion would compel the master to hold that Mr. Ahl must be paid the $80,000 bonds, unless they were in the hands of innocent holders. For the contract was, that he should have $80,000 in second mortgage bonds, which meant that there was to be no intervening incumbrance; and the confessing of the two judgments and then tendering to him the second mortgage bonds was not a compliance with the contract. * But still, at this very time, Mr. Ahl was dealing with Mr. Jones, the *agent* for the very directors whom he (Ahl) had put into office for the very purpose of doing Mr. Jones's bidding. * * In the opinion of the master, this transaction, as against the genuine stockholders and subscribers to the stock and the creditors, stands in no better condition than the agreement of December 7, 1869. * *

"The question to be decided is, who in equity and good conscience ought to take this money? * * Promoters, directors or agents of a company shall not make a profit out of it in buying lands for it, or in dealing with it. * * So far as Messrs. Ahl and Jones are concerned as against the genuine stockholders and creditors of the company, their dealings have been in fraud of them. What Mr. Jones's actual profit on his railroad contract was does not appear."

The master then enumerated certain items of his profit, and proceeded:

"He also got and has $625,000 in stock. Mr. Ahl has already received $50,000 in cash and $50,000 in good gold bonds, and $120,000 in company stock. * * Both of them were bound to put into the treasury of this company, for their stock respectively, the sums of $120,000 and $625,000 in money or

its value. Neither of them has done this. Had they each been dealing with a real corporation, or real directors of such a company, 'at arm's length'; or had they informed the other subscribers of their actual plans, instead of studiously and carefully concealing all these inside agreements and plans from them, their position would have been as clear and impregnable as that of any other man who acted in good faith. * *

"In the opinion of the master, neither of these parties, in good conscience and equity, is entitled to any of the fund in court as against the creditors and other stockholders of the company. * *

"The fund is to be distributed to the liens in their order. The judgments to the Reading banks are first; then the lien of the second mortgage. The only parties holding bonds who are entitled to be paid are Mr. Keim, Mr. Rice, the Reading banks and Bushong & Bro., to the extent heretofore allowed. And after the bondholders, comes Mr. Rice's judgment, which is only partially paid by the balance."

The master reported distribution as follows:

Balance including interest on the fund, since January 27, 1873, after deducting the master's fees and other expenses			$318,147.10
To Farmers' Bank of Reading, assignee of judgment in favor of A. L. Boyer,	$25,000.00		
Interest and costs . .	3,834.95	$28,834.95	
Same—Notes of September 1st and October 5, 1871, $15,000 each . . .	30,000.00		
Interest	1,366.23	$31,366.23	
			$60,201.18
To Reading Savings Bank—assignee of judgment in favor of A. L. Boyer, .	25,000.00		
Interest and costs, . .	3,834.95		
		$28,834.95	
Same—Note, Oct. 20, 1871	2,669.07		
Same—Note, Nov. 23, 1871	5,000.00		
Interest on both notes . .	461.78	8,130.85	
			$36,965.80

To H. M. Keim—three second mortgage bonds . .	3,000.00		
Coupons and interest . .	188.13		
Premium on gold . .	366.63		
			3,554.76
To Bushong & Brother–Note, August 1, 1871 . .	22,600.00		
Same—Note, Oct. 16, 1871	15,120.00		
Interest on both notes . .	2,304.23		
			40,024.23
To Kensington Bank—Note, October 6, 1871 . .	25,000.00		
Same—Note, Nov. 29, 1871	8,000.00		
Interest on both notes . .	1,930.38		
			34,930.38
To John Rice—twenty-five second mortgage bonds .	25,000.00		
Coupons and interest . .	2,347.87		
Premium on gold . . .	3,144.98		
		30,492.85	
Same on account of judgment		111,977.90	147,475.75
			$318,147.10

All the claimants except Rice filed exceptions with the master to his report.

The master reported on the exceptions that they presented no grounds upon which he should change his report.

The exceptions were argued in the Supreme Court, March 18, 1875, before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, GORDON, PAXSON and WOODWARD, JJ.

W. S. STENGER and BLACK (with whom were D. W. SELLERS and W. MCLELLAN), for Ahl.

W. MACVEAGH and G. W. BIDDLE (with whom was C. H. JONES), for R. L. Jones.

A. D. CAMPBELL, for Kensington Bank.

G. F. BAER, for the Reading banks, Bushong & Brother and H. M. Keim.

F. C. BREWSTER, and A. K. MCCLURE (with whom was S. G. THOMPSON), for Rice.

W. S. STENGER and J. STEWART, were for Keefer, Teeter and Fries.

The other exceptants were not represented.

Mr. Justice PAXSON delivered the opinion of the court, November 24, 1875.

This case differs essentially from the one presented by the former master's report. We have now a full history of the organization of the company and of its affairs down to the sale by the trustee of its property and franchises. A large amount of additional testimony has been taken, from which the master has found the facts clearly, and in the main accurately. The former rulings of the court were made upon the case as presented at the time. In the examination and decision of the case now we have the benefit of the additional light thrown upon it by the report of the present master.

The fund is insufficient to pay the liens as they stood against the property on the day of the sale. Hence it is clear that no creditor, whose claim is unprotected by a lien, can share in the distribution. It is therefore useless to make further reference to claims of this class. The lien claims as found and allowed by the master are as follows:

1. Judgment of the Farmers' National Bank of Reading for $25,000
2. Judgment of the Reading Savings Bank for . . 25,000
3. The second mortgage under which the property was sold 200,000
4. Judgment of John Rice, for 125,000

The liens are stated in the order of their priority. As the net fund for distribution, exclusive of interest, is $305,000, it is manifestly insufficient to pay them all in full. The judgments of the Reading banks, being first in point of time, are entitled to payment to the extent they have been allowed by the master. The reduction of these judgments to the amount actually loaned by the banks, was right, and needs no discussion. Next comes the mortgage of $200,000. This also must

be fully paid to the extent that the bonds are in the hands of *bona fide* holders for value. After which, if there be any surplus, it must be applied to the subsequent judgment.

The principal contention is over the second mortgage bonds. It is important to understand where they are, and by whom, and for what purpose held. The entire number, two hundred, of one thousand dollars each, were issued by the company, and are now held as follows: sixty-five thereof are held by the Kensington Bank as collateral security for two loans, aggregating $33,000, made to the company; fifty of these bonds so pledged to the Kensington Bank, belong to Richmond L. Jones, and were a portion of a batch of seventy-five of said second mortgage bonds, issued to him by the company in lieu of $50,000 of the first mortgage bonds of said company, which he was entitled to receive upon account of his contract for the construction of the road. Mr. Jones agreed to receive these second mortgage bonds, and they were formerly delivered to him in satisfaction of his claim to the first mortgage bonds. His title to them is therefore complete. Subsequently, as the master finds, he pledged fifty of these bonds ($50,000), with fifteen of the second mortgage bonds ($15,000), belonging to the company, with Charles T. Yerkes, Jr., in order to raise money for the company; Yerkes obtained the money from the Kensington Bank and deposited the said sixty-five bonds as collateral. The bonds so pledged are liable to the bank for the amount of money loaned thereon. After the debt due the bank is paid Mr. Jones is entitled to so many of the said bonds as may remain, and to come in upon the fund to that extent, unless prevented by a higher equity in some one else.

The Allegheny National Bank (C. L. Magee) is, or was, the holder of ten ($10,000) of these bonds. The master finds that said bank is not a holder for value, and for satisfactory reasons reports against this claim.

H. M. Keim, of Reading, is the holder of three ($3,000) of the bonds. His claim was properly allowed by the master. So, also, the claim of John Rice as to twenty-five ($25,000) of said bonds. There are ninety-seven ($97,000) of the bonds remaining. They are held by H. H. Muhlenberg, in trust for the Reading banks before mentioned, and for Messrs. Bushong & Brother, bankers, as collateral for certain loans and advances

made to the company. Said loans include the two judgments of $25,000 each to which reference has already been made. These transactions were arranged by Richmond L. Jones, by authority of the company. In order to enable him to raise money for the corporation, as well as to secure him upon his own indorsements, and those of his friends, all that remained of the second mortgage bonds, amounting to one hundred and twelve ($112,000), were placed in the hands of Mr. Jones. Among the bonds thus handed over to him and pledged for the benefit of the company, and which are now held for account of the Reading banks and Messrs. Bushong & Brother, are eighty of these second mortgage bonds ($80,000), Nos. 1 to 80 inclusive. These bonds were originally issued to Daniel V. Ahl, by the company, and intended as part payment for the ore-lands sold by Mr. Ahl to the said company. By his contract with the latter, Ahl was entitled to $80,000 of second mortgage bonds. When they were tendered him he refused to receive them, for the reason that the judgments of the Reading banks had been entered up before the second mortgage was executed and recorded. The effect of this was to make the mortgage a third instead of a second lien. These eighty bonds were sent to Messrs. Kennedy & Stewart, attorneys-at-law, Chambersburg, Pa., for the purpose of delivery to Mr. Ahl, who refused to receive them, as before stated. Upon this point the master finds the following facts: "Shortly after November 28, 1870, Mr. Ahl called on Messrs. Kennedy & Stewart, and he was told by them that they had the bonds to deliver to him, and would get them from the bank for him. He declined to accept the bonds, said they need not go and get them, and gave as his reason that the bonds were not, as he said, second mortgage bonds, such as he was entitled to receive under the agreement. This objection and refusal were made to Messrs. Kennedy & Stewart repeatedly between that time and August, 1871. He was accompanied by his counsel, and he asked Messrs. Kennedy & Stewart to use their influence to get the officers of the company to remove the judgments; and he was informed by them that Mr. Jones said it could not be done. Messrs. Kennedy & Stewart regarded his refusal as final and conclusive." Subsequently, as the master finds, when the company became further embarrassed, and

Mr. Ahl learned that they were in the hands of other parties as collateral, he expressed regret that he had not taken them, and said that he had been badly advised. Yet even then he did not allege that they belonged to him. Now, he claims these eighty bonds, and says that after setting them apart for him, the company had no right to authorize Jones to pledge them for its debts. That his refusal to accept them did not in equity change the property in the bonds, and that it was open for him to accept them at any time. This claim amounts to nothing as regards the Reading banks and Bushong & Brother. They are holders for value, and the bonds passed by delivery. Nor is it valid against other lien-creditors of the company. Mr. Ahl has no legal claim upon the bonds or the fund before us. This is a question of lien. Mr. Ahl has no lien. The mortgage was a lien, but it was for the protection of the bonds issued under it, and which it was intended to secure. Aside from the ownership of the bonds, or a portion of them, Mr. Ahl has no interest, legal or equitable, in the mortgage. It was not created for his benefit, but for the purpose of enabling the company to raise funds to meet its obligations. Among those liabilities was the $80,000 due Mr. Ahl. He was offered the security of the mortgage and declined it. He deliberately rejected the bonds when tendered. He rejected them under the advice of counsel. He certainly had a purpose in view in doing this. The bonds offered were not such a security as under his agreement he was entitled to receive. But they were the best the company could give him, and he was fully aware of this. He knew they could not raise the money to satisfy the judgments. He had already received the money realized upon the latter. He could only have had in view, therefore, the obtaining of better terms from this already embarrassed company. At that time he was still in possession of the furnace. He saw they could not comply with the letter of the contract by giving him bonds which should be a second lien. He had a right of present action against the corporation, either for breach of covenant, or for the unpaid purchase money. He could enforce this right by suit, or avail himself of it as a defense to an action of ejectment. He may very well have preferred a judgment payable presently, to even second mortgage bonds payable at a distant day

Whatever may have been his motive for rejecting the bonds, it is undisputed that he did reject them, and he must be held to all the legal consequences of his act. After such rejection the company had full control and dominion over them. They could sell them in the market, or pledge them for their debts. Ahl had no further claim upon them. He had a right of action against the company, nothing more.

But there is another serious obstacle in the way of Mr. Ahl. He has no standing in a court of equity to claim anything of this company until its debts are fully paid. The stockholders have an equity which entitles them to have its assets applied to the payment of its liabilities before Mr. Ahl can be allowed to lay his hand upon a dollar of its effects. This equity of the stockholders inures to the benefit of the judgment creditors of the company. John Rice, as a judgment creditor, claims and is entitled to its benefit.

Upon this branch of the case the auditor has found the facts very fully. We need only to refer to a few, about which there is very little dispute. This corporation was gotten up by Daniel V. Ahl and Richmond L. Jones. Each had an object. Ahl wanted to sell his ore-lands, and Jones desired the contract to build the road. Each succeeded in his purpose. Ahl sold his lands and Jones obtained the contract. They controlled the corporation absolutely. Ahl held a large majority of the stock originally, and elected a board of directors to do the work that Mr. Jones, his co-schemer, required done. There was the form of an organization; there were a few outside stockholders scooped up by Ahl's net; but for all practical purposes the corporation was Ahl & Jones, or Jones & Ahl, it is not material which. In considering the question whether these gentlemen are entitled to any portion of the fund, we must scrutinize closely the contract made by each with the company. While the right of a stockholder to contract with his corporation and become its creditor, is conceded as a general proposition, the right of a person controlling a corporation to contract with it, rests upon entirely different principles, if it exists at all. Where a person has the actual control of a corporation, whether such control arises from the ownership of a majority of the shares, or from his position or influence, and enters into a contract with such corporation, he is to be held to the most rigid

good faith. The *onus* is upon him to show the fairness of the transaction, if it is called in question. It is a principle too well settled to be now successfully controverted, that the promoters, directors or agents of a company, shall not make a profit out of it in buying lands for it, or in dealing with it. This principle runs through all the fiduciary relations: *Simons* v. *Oil Company*, 11 P. F. Smith, 202; *McElhenny's Appeal*, Id. 188; *Short* v. *Stevenson*, 13 Id. 95; *The Railroad Co.* v. *Bowser*, 12 Wright, 37; *Bailey* v. *The Gas Co.*, 19 P. F. Smith, 340; *Bank* v. *Judah*, 8 Conn. 145; *Abbott* v. *The Rubber Co.*, 33 Barb. 593; *Michoud* v. *Girod*, 4 Howard, 554; Hill on Trustees, 148. Tried by this crucial test what becomes of Mr. Ahl's contract for the sale of his ore-lands? The master finds that in his first negotiations with Jones, Ahl put his 5,400 acres at $100,000, which was probably their full value. It is clear that the price originally contemplated for the lands was $50,000 in cash, $50,000 in stock and $50,000 in bonds. Yet after the company had been organized; after over $100,000 in outside subscriptions to the stock had been made, Ahl demands better terms. He had the company at a disadvantage, and he virtually compels the agreement of December 9, 1869, by which he was to have $50,000 in money, $130,000 in bonds and $120,000 in stock, for about three fourths of the land which he had previously estimated at, and was willing to sell for $100,000. It was no answer to this to say, that as the previous negotiations had not been closed up Mr. Ahl had the right to make the best terms he could. This might have been so had he been dealing with a stranger at arm's length. But he was not. He was dealing with a corporation that was practically his own creature. He was in effect dealing with himself. The agreement of December 7th was virtually forced upon the company. So far as Mr. Ahl is concerned, that agreement was a fraud in law and a fraud in fact. That a man may get up a corporation for the purpose of selling his lands, and after gathering in a few innocent and unfortunate stockholders, from whom his purpose is studiously concealed, proceed to put off his lands upon them, not at a fair price, but for such sum as his avarice or the helpless condition of the company may tempt him to exact, is a proposition too monstrous to obtain the sanction of a court of equity. I am aware that a loose

morality has prevailed to some extent in railroad and monetary affairs. It may be in part the result of the speculations induced by an inflated currency, and must run its course until checked by the reaction of a more healthy public sentiment.

It will thus be seen that Mr. Ahl has no claim to any portion of the ninety-seven bonds. They were specifically pledged by authority of the company for certain claims of the Reading banks and Bushong & Brother. I have already said that the latter were holders for value, and that the bonds passed by delivery. The master was clearly right in awarding to these claimants the amount of their claim for which said bonds were so pledged.

The master rejected the claim of Richmond L. Jones to the remainder of the bonds held by the Kensington Bank, after the debt of said bank is satisfied. He is of opinion that the claims of Ahl and Jones rest upon similar principles. Fortunately for Mr. Jones, the facts are different. The master does not find that the contract between Mr. Jones and the company for constructing the road was a fraud upon said company. Nor that he afterward sought to alter it, and used his position to extort different and oppressive terms. He made his contract and adhered to it faithfully. We have no means of knowledge as to what extent it was profitable. Nor was Mr. Jones a party to Ahl's fraud in the sale of his ore lands. He resisted it as far as he could. We think the master was right in finding that Richmond L. Jones contemplated no fraud upon the company. His chief offense appears to have been the undertaking of a work entirely disproportioned to his means. This involved struggles and shifts to raise money. That some of his transactions while thus engaged were irregular, is apparent. But we fail to perceive in any of them an intent to defraud the company. His acts, whether good or bad, appear to have been the result of an honest endeavor to save the credit of the corporation. If, in the struggle, he has to some extent damaged his own, the punishment is by no means inconsiderable. The law does not require that we should add to it the loss of his bonds. The master has reported against his individual claim. We do not see any sufficient reason to disturb this finding; but his claim as a bondholder to the residue of the sixty-five sec-

ond mortgage bonds, after satisfying the claim of the Kensington Bank, should have been allowed.

The master rejected the claim of Messrs. Bushong & Bro., upon a judgment entered against R. L. Jones for $5,333.33, and also upon a note for $250. He also rejected the claim of the Reading Savings Bank upon a note of R. L. Jones for $5,806.91. These liabilities were incurred by Mr. Jones on the faith of the resolutions of April and May, 1871. It is conceded they were for the benefit of the company. Are the holders of these claims entitled to the protection of the ninety-seven second mortgage bonds? The principle is well settled, that where a surety, or a person standing in the position of a surety, for the payment of a debt, receives security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the benefit of that security, and it makes no difference that the principal creditor did not know of this at the time, or give credit on the face of it: *Cornwell's Appeal*, 7 W. & S. 305; *Erb's Appeal*, 2 Penna. R. 296; *Himes* v. *Barnitz*, 8 Watts, 39; *Carman* v. *Noble*, 9 Barr. 366; *Hancock's Appeal*, 10 Casey, 155. The master concedes the truth of this general propositian, but says, substantially, that Jones's relations to the company are such, that as surety, he is not entitled to claim, and that, therefore, these holders are not. We do not regard this position as sound. The debts upon which the claims are based, were contracted for the use of the company. The latter received the consideration. The bonds were placed in the hands of Jones to cover these among other liabilities. It is true they were not specifically pledged by Jones for these claims. But they were pledged *to* Jones *by* the company, for the purpose of procuring these loans, and therefore the holders of the claims are entitled to the benefit of the security. This right does not depend upon the equities between Jones and the company, arising out of other transactions. There is a surplus of bonds in the hands of the trustees. What disposition shall be made of them? It is clear that Jones is not entitled to them as security for any balance the company may owe him on his individual account. They were not pledged as security for any such indebtedness to him, and if they were, the master has not found that the company is indebted

to him, or that he is liable as guarantor or otherwise, for any other moneys obtained for the use of the company on the pledge or security of the bonds. The surplus bonds, therefore whatever their amount, belong to the company, which is not entitled to any portion of the fund until its debts are paid.

To avoid the delay which must necessarily result from sending this case back to the master, I have prepared a corrected table of distribution. (Prout schedule.) It will be observed, that according to the master's report, there is an accumulation of interest amounting to $30,900. A considerable amount of interest must have accrued since. The payments made under the first master's report, including the trustee's fee and payments made by the trustee since, and the master's fee in this case, amounting in the aggregate to $17,752.90, as well as the costs of this appeal, are to be paid out of the interest. The balance of the interest will be distributed pro rata to the different claims allowed.

DECREE.

This cause came on to be heard at the last January Term of this court, at the city of Philadelphia, upon exceptions to the report of George Junkin, Jr., Esq., master, and was argued by counsel, whereupon, this 24th day of November, 1875, it is considered, adjudged and decreed by the court, that all of the exceptions filed to said report be dismissed, except in so far as they are sustained in this opinion; and it is now further ordered that distribution of the principal of the fund in controversy shall be made as follows, viz.: to the Farmers' National Bank of Reading, the sum of $28,834.95; to the Reading Savings Bank, the sum of $28,834.95; to Henry M. Keim, the sum of $3,554.76; to John Rice, on account of his bonds, the sum of $30,492.85; to the Farmers' National Bank of Reading, before named, the further sum of $31,366.23; to the Reading Savings Bank, before named, the further sum of $14,312.83; to Bushong & Bro., the sum of $45,986.56; to the Kensington National Bank, the sum of $34,938.84; to Richmond L. Jones, the sum of $47,054.43; to John Rice, on account of his judgment, the balance of said principal, amounting to the sum of $39,623.60; that as to the interest on said fund reported by the master, as well as the interest which has

accumulated since, there shall be deducted therefrom the payments made under the first master's report, including trustee's fee, and payments made by trustee since, as per master's report, and master's fee in this case, aggregating the sum of $17,752.90; and also the costs of this appeal. The residue of the interest remaining after these deductions shall be distributed pro rata to the different claims allowed in this opinion and decree; and the prothonotary of the Eastern District is directed to ascertain the amount of such interest, and to add the pro rata share to each claim allowed as aforesaid.

Chief Justice AGNEW and Mr. Justice WOODWARD dissented from that part of the opinion and decree rejecting Ahl's claim.

Mr. Justice PAXSON delivered a supplemental opinion and decree January 13, 1876.

A question has been raised in regard to the proper construction of so much of our decree of November 24, 1875, as directs distribution of the interest. We are also informed that by reason of an advance in the market value of the securities in which the fund was invested, a considerable sum has been realized by their sale over and above the cost of said securities. The entire amount of said interest, less the deductions referred to in said decree, with the amount of said increase, making together the sum of $51,753.35, has been paid into court, and awaits our further order.

It is urged, on behalf of John Rice, that as to the increase in the fund, it is to be treated as principal, and awarded to him upon his judgment; and that as to the interest, by the terms of our said decree, he is entitled to a pro rata share thereof upon the whole amount of his judgment ($125,000). If the language of our decree will bear such a construction, it must be modified. The interest is the product of the principal. Each of the parties is entitled to interest in exact proportion to his share of the capital earning such interest. So likewise as to the increase of the fund. The rights of the parties to the principal were adjusted as of the day of sale. Since then the fund as a whole has grown or increased a certain amount or percentage. It follows that the share of each creditor entitled to participate in the distribution has grown

in a corresponding ratio, and he will be entitled to said increase in the same proportion that the amount of principal awarded him bears to the entire principal of said fund.

The Kensington Bank claims that as between it and Richmond L. Jones, it is entitled to interest to the day of distribution. This may be so but we do not think we are called upon to adjust such equity in this proceeding. We leave it open for the adjustment of the parties, without prejudice to the rights of either.

SUPPLEMENTAL DECREE.

And now, January 13, 1876, it is further ordered, adjudged and decreed that the fund in court, amounting to $51,753.35, less proper costs and commissions of the prothonotary, be distributed by the prothonotary to the parties entitled to the principal fund under our decree of November 24, 1875, in the exact proportion which the amount of principal awarded to them respectively bears to the whole of said principal sum provided that no creditor shall be paid more then his debt and interest to the day of distribution, and the excess, if any, to be applied to the judgment of John Rice.

TWIN-LICK OIL COMPANY v. MARBURY.

(91 United States, 587. Supreme Court, 1875.)

[1] **Contract of director with company.** A director of a corporation is not prohibited from lending it moneys when needed for its benefit, and the transaction is open; nor is his purchase of its property at a fair sale, under trust deed securing his loan, an invalid transaction.

Voidable contracts—Option to be exercised in reasonable time. The general doctrine regarding contracts between a corporation and one who occupies toward it a fiduciary relation as director is, not that such contracts are absolutely void, but that they are voidable, and that the option to avoid must be exercised within a reasonable time. What is a reasonable time must be decided in each case upon all the elements of it which affect that question.

[1] *Merrick* v. *Peru Co.*, 3 M. R. 583; *Harte* v. *Brown*, 4 M. R. 1.

[1]**Sale under trust deed—Purchase by director—Laches peculiarly incident to property such as oil wells.** Upon a bill to set aside a trust deed sale of certain oil well property, which had been granted to a director as security for a loan, it was *held* that oil wells are a species of property which is, more than any other, subject to rapid, frequent and extreme fluctuations in value, and that the bill was properly dismissed, it appearing that there was no fraud committed by the director who purchased, and that the bill was not filed until nearly four years after the sale, when the skill and money of the purchaser had made the property valuable.

Appeal from the Supreme Court of the District of Columbia.

J. D. MCPHERSON and CHARLES BEASTEN, Jr., for the appellants.

WALTER S. COX and W. D. DAVIDGE, for the appellee.

Justice MILLER delivered the opinion of the court.

The appellant here, complainant below, was a corporation organized under the laws of West Virginia, engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of $2,000, for which a note was given, secured by a deed of trust, conveying all the property, rights and franchises of the corporation to William Thomas, to secure the payment of said note, with the usual power of sale in default of payment. The property was sold under the deed of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was, at the time of these transactions, a stockholder and director in the company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property. It charges that defendant has abused his trust relation to the company, to take advantage of its difficulties, and buy in at a sacrifice its valuable property and franchises; that, concealing his knowledge that the lease of the ground on which the company operated included a well, work-

[1] *Leaming* v. *Wise*, 73 Pa. St. 173, *Post* FRAUD; *Evans' App.*, 81 Pa. St. 273, *Post* LACHES; *Morgan* v. *McKee*, 3 M. R. 128.

ing profitably, and by promises to individual shareholders that he would purchase in the property for the joint benefit of the whole, he obtained an unjust advantage, and in other ways violated his duty as an officer charged with a fiduciary relation to the company. As to all this, which is denied in the answer, and as to which much testimony is taken, it is sufficient to say that we are satisfied that the defendant loaned the money to the corporation in good faith, and honestly to assist it in its business in an hour of extreme embarrassment, and took just such security as any other man would have taken; that when his money became due and there was no apparent probability of the company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that in short, there was neither actual fraud nor oppression; no advantage was taken of defendant's position as director, or of any matter known to him at the time of the sale, affecting the value of the property, which was not as well known to others interested as it was to himself; and that the sale and purchase was the only mode left to defendant to make his money.

The first question which arises in this state of the facts is, whether defendant's purchase was absolutely void.

That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others: *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715; *Drury* v. *Cross*, 7 Wall. 299; *Luxemburg R. R. Co.* v. *Maquay*, 25 Beav. 586; *The Cumberland Co.* v. *Sherman*, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under ti. We say, this is the general rule, for there may be cases where such contracts would be void *ab initio;* as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But

even here, acts which amount to a ratification by the principal may validate the sale.

The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it can not be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are in such a transaction three distinct parties, whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.

The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is, to enable it to make contracts; and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true that as a stockholder in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregate interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his rep-

In the recent case of *Upton, assignee*, v. *Tribilcock*, 91 U. S. 45, it was held that the purchaser of stock in an insurance company, who had offered to rescind within two or three months because his note had been sent to a bank for collection in fraud of the agreement to the contrary, could not avail himself of that offer to let in as defense other fraudulent representations then unknown to him, when he was sued by the assignee in bankruptcy for the unpaid installments on that stock after the bankruptcy of the company.

The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellee's counsel. The more important are as follows: *Badger* v. *Badger*, 2 Wall. 87; *Harwood* v. *R. R. Co.*, 17 Id. 78; *Marsh* v. *Whitmore*, 21 Id. 178; *Vigers* v. *Pike*, 8 Cl. & Fin. 650; *Wentworth* v. *Lloyd*, 32 Beav. 467; *Follansbe* v. *Kilbreth*, 17 Ill. 522.

The cases of *Bliss* v. *Edmondson*, 8 DeG., M. & G. 787, *Prendergast* v. *Turton*, 1 You. & Coll., while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.

The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any

thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.

The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt.

The defendant then had a survey made of the ground leased to the corporation, the lease being the main thing he had acquired by the sale. When the lines were extended, the lease was found to embrace a well, then profitably worked by another company. Of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the company into a profitable business. With full knowledge of all these facts, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all the hazard was over, and the defendant's skill, energy and money had made his purchase profitable, was any claim or assertion of right in the property made by the corporation or by the stockholders.

We think, both on authority and principle—a principle necessary to protect those who invest their capital and their labor in enterprises useful but hazardous,—that we should hold that plaintiff has delayed too long.

Decree affirmed.

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Attorney's contract with corporation—Power of officers—Presumptions.—Plaintiff proposed in writing to do the legal business of the defendant for a year at $250 per month. *Held*, that statements by the officers of the company that it had accepted the proposition would not bind the company when in fact it had not done so. *Held*, also, that the fact that bills for the salary claimed were presented, allowed and paid, for a series of months, would raise the presumption that plaintiff's proposition was accepted, but such presumption is entirely destroyed when it is affirmatively shown that the proposition was not submitted to, or acted on by the board of trustees. *Hillyer* v. *Overman S. M. Co.*, 44

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1. *Brick contract—Title in owner of clay—Dealing with the maker.*—One Ultzman made brick on the land of plaintiff under contract by which no title to the brick was to pass until plaintiff was paid for his clay and his wood used in the manufacture.

Ultzman sold a lot of these brick to defendant, who supposed he was buying Ultzman's property, and in payment he applied a set-off which he had against Ultzman. *Held*, 1. That the contract was not within the statute of frauds. 2. That the apprehension of the defendant that he

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2. *Breach of condition—Re-entry.*—In such a case, when the grantors remained in possession of the premises, upon the breach of the condition they became revested with the estate conveyed, unless they waived the forfeiture, and there was no need of a clause reserving the right of re-entry for the breach.

3. *Waiver of breach.*—Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach. *Id.*

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1. *Agreement relative to mineral land construed.*—P. and B. agreed in writing concerning certain lands owned by P. but occupied by squatters, that P. would extinguish the squatters' claims by compromise within sixty days after B. should pay P. $5,000, but if P. found it impracticable to compromise, he was to take legal measures to extinguish the claims. and in the latter event B. was to pay to P. such sums as should be needed for the purpose, not exceeding $2,000. If P. could effect the settlement, B. was to pay the $5,000 to P., or such part thereof as he might desire, with-

CONTRACT. *Continued.*

in thirty days after notice from P. P. also agreed to convey the land to B. for $50,000, including the said $5,000, and to put B. in possession in sixty days, with the right to appropriate the ore and minerals thereon, etc. B. was not to be personally liable for any sum except the $5,000, the property being security for the balance. P. compromised with some of the squatters, but made no final settlement; he then made a supplemental agreement with B., providing, among other things, that B. should pay to P. $1,500 on the contract within sixty days, and also a $1,000 more in ninety days if P. required it to settle with the squatters. *Held*, 1. That B. did not agree to pay P. absolutely, but only such part thereof as P. should need to effect a settlement with the squatters. 2. That the $1,500 paid by B. under the modified contract, was not paid as the consideration of such modification, but to be applied by P. toward the sum needed to settle with the squatters. 3. That P. could not charge against the $5,000 a sum which he had promised to one of the squatters as the purchase price of a parcel of land outside of the tract, such purchase being in excess of his authority. *Pease* v. *Brown*, 46

2. *Marble quarry and mill contract construed.*—The contract in this case *held*, not to prevent the working of the quarry *ad libitum* for the benefit of the owners, nor does it leave in the grantor a corporeal interest in the marble *in situ*. *Rutland Marble Co.* v. *Ripley*, 291

3. *Charcoal contract—Dependent covenants.*—The stipulations contained in contract in these words: "A B contracts with C D to furnish at Long Creek Furnace from 500 to 1,000 bushels of coal daily at 6½ cents per bushel; C D to furnish the timber *gratis*, and advance to A B all the money, weekly, necessary to pay off the wood choppers," are dependent, and if without fault on the part of the owner of the furnace, and without legal excuse, the quantity of coal agreed for is not delivered, the owner of the furnace may properly set up such failure by way of counter claim to an action for the price of the coal. *Burton* v. *Wilkes*, 88

4. *Tunnel contract—Provisions.*—A company owning a quartz ledge, having contracted for the running of a tunnel to cut the same, and having promised the plaintiff to pay for provisions to be furnished the tunnel contractor, in case the contractor failed to reach the ledge, is bound upon such promise to pay, the tunnel being abandoned without reaching the lode. *Van Dusen* v. *Star Quartz Co.*, 26

5. *Contract licensing to sink oil wells, construed as to the remedy.*—An agreement was to lease "the exclusive right and privilege of boring for oil, etc., upon the farm upon which the first party now resides, with the right of access to and from such places as may be selected by the party of the second part; said boring to be done so as to do the least possible injury to the farm." The consideration was $150 and one third of product. The holes to be sunk to satisfy the parties as to practicability and profit for oil. *Held*, that this created an incorporeal hereditament, and the only possession of the grantee was such as was necessary for the enjoyment of the right. *Held*, further, that the remedy for disturbance of the right was case, and that ejectment would not lie. *Union Petroleum Co.* v. *Bliven Petroleum Co.*, 107

CONTRACT. *Continued.*

6. *Oil contracts—Evidence of entirety.*—Defendants bought 4,000 barrels of oil from plaintiff, and eight similar papers the same day were executed by them, each calling for the delivery of 500 barrels on the last day of certain consecutive months, payment to be made on each delivery. *Held*, that there were several contracts, and parol evidence was inadmissible to show that at the time of the purchase it was agreed that it was an entire contract, and that the several papers were executed with that understanding and according to the custom of the trade. *Morgan* v. *McKee*, 128

7. *Condition—Statute of limitations.*—M. promised in writing to pay $449 to W., providing, however, that the note should be void if certain coal mines failed to yield a profit to M.; he sold the mines before they yielded a profit. *Held*, that a cause of action accrued against M. immediately upon the sale, because he then voluntarily put it out of his power ever to realize a profit from the mines. *Held*, also, that the statute of limitation began to run from the date of the sale. *Wolf* v. *Marsh*, 204

8. *Conditional agreement—Vendor's lien.*—In settlement for extra work done by plaintiff in the building of a quartz mill for the defendant, and in consideration of a conveyance by plaintiff to defendant of his interest in the mill, the defendant agreed to pay plaintiff $2,575 out of the first net proceeds of crushing and reducing ores of gold and silver in said mill from the defendant's mine, the debt not to be otherwise collectible until there were such net profits. There were no such profits. *Held*, that plaintiff had no right of action for the $2,575, nor for the enforcement of a vendor's lien against the mill. *Toombs* v. *Consolidated P. M. Co.*, 210

9. *Subscription for lease.*—A subscription paper called for a lease of oil land as soon as 25 shares of $100 each were paid. This amount being paid, there was tendered a lease reserving one fifth royalty and also surface rights. *Held*, that the $2,500 was the sole consideration, and that the subscribers were entitled to a lease clear of royalty and reservations. *Reddington* v. *Henry*, 31

10. *Construction—Covenant by lessee to purchase—Evidence.*—An agreement indorsed on a mining lease that "the parties of the second part shall at the expiration of two years from the date hereof, pay unto the said B. the sum of $10,000, in lieu of the ten per cent. agreed upon in said lease; then the said B. shall make a good and lawful deed of conveyance for the above described premises in the within lease," construed to be upon its face an absolute contract by the lessee to pay and purchase at the end of two years, and in the absence of fraud or misrepresentation, it was *held*, that parol evidence was inadmissible to explain it. *Suffern* v. *Butler*, 22

11. *Liability to assignee.*—This liability of the principal is the same to the assignee of the demand, even if the assignee had notice before the goods were sold that the agency had ceased. *Van Dusen* v. *Star Quartz Co.*, 26

12. *Payment dependent on condition of mine.*—The meaning of a contract reading "Twelve months from date, with interest from date, I

CONTRACT. *Continued.*

promise to pay William Richards $6,662 in the event the Rhodes gold mine continues to prove, at the expiration of said time, a good gold mine," is, that the payment is due if the mine continues at the end of the year as good a mine as it was at the beginning. *Richards* v. *Schlegelmich*, 78

13. *Application of the rule excluding parol contradictions.*—Where a writing is not ambiguous, and there is no allegation of fraud or mistake, its words taken in their usual meaning must be construed as expressing the true intent of the contracting parties, and the rule excluding resort to parol evidence, must be applied. *Suffern* v. *Butler*, 23

14. *Owner—Contractor and workman—Implied acceptance.*—An owner, who was having a shaft sunk by contract, and who kept the time-books and paid off the contractor's men, paid the plaintiff, one of the workmen, about half his claim, and at the same time wrote him out an order on himself for the balance, which order he gave to the plaintiff to have signed by the contractor. The order was not signed for six weeks. The owner had meanwhile paid off the contractor. *Held*, that he was liable on the order, and should have retained sufficient to pay it on his settlement with the contractor. *Lumaghi* v. *Neuber*, 125

15. *Contract not running with land.*—C., one partner, contracted to sell ore from the common property to H., for a particular furnace, to be paid for in iron from that furnace, E., the other party declining to join. E. and P. afterward bought H.'s furnace, so that he could not furnish iron. *Held*, that the contract with H. did not run with the land, and E., after the purchase, was not responsible to C. on the contract. *Grubb's Appeal*, 416

16. *Want of privity.*—E. gave indemnity to H. against damages to C. for failing to fulfill his contract. *Held*, that this created no liability on E. to C. on account of H.'s contract. The indemnity created no privity between E. and C. *Id.*

17. *Want of privity.*—If A purchase ore of B, and C, without the knowledge or consent of A, delivers his ore in fulfillment of the contract of B, the relation of vendor and purchaser does not exist between A and C. *Randolph Iron Co.* v. *Elliott*, 63

18. *Waiver of tort.*—In such case, after demand and refusal, or actual conversion, trover will lie; or after the sale of the ore by A, the *tort* may be waived, and *assumpsit* maintained by C. *Id.*

19. *Second purchase of same ore.*—C. contracted with E. in March to deliver 1,000 tons of ore at a future date; before the delivery C. and his co-owners sold the ore to R., who delivered the ore to E., who paid C. therefor. The evidence showed that E. knew that R. was the owner of the ore at the time of the delivery thereof. *Held*, that R. could recover the price of the ore from E., notwithstanding his payment to C. *Id.*

20. *A contract for the future delivery of ore* vests no title in the ore in the vendee until it is set apart. *Id.*

21. *Payment for timber pro-rated on mine—Liquidated damages.*—By contract, S. agreed to furnish W. C. Coal Co. all the timber they

CONTRACT. *Continued.*

should require at their mines during 1867: they to pay him eighteen cents on each ton of coal mined, and if the amount of coal mined fell short of 75,000 tons they were to pay the difference between the actual tonnage and the specified number of 75,000 tons. *Held*, that the price agreed on by the parties for the fulfillment of the contract was eighteen cents per ton on 75,000 tons, and that the eighteen cents paid on the tonnage not really mined, was liquidated damages, and not a penalty. *Wolf Creek Co.* v. *Schultz*, 95

22. *Timbering shaft voluntary.*—In an action upon a contract to sink a mining shaft a certain number of feet at a specified sum per foot, without any specific agreement for timbering, *held*, that in the absence of proof of a custom requiring such work in sinking a mining shaft, the quality of the timbering would not be considered, that being no part of the contract, but purely voluntary. *No. 5 Co.* v. *Bruce*, 146

23. *Evidence of several contract on joint suit.*—If one is bound by contract to two persons severally, and only severally, their interests being also several, they can only sue upon it severally, and in a joint action they will not be permitted to introduce evidence of a several contract. *Id.*

24. *Severable contract.*—The K. Coal Co. agreed to deliver 50,000 tons of coal within a year at the rate of 6,000 tons monthly at the opt on of S., who was to give notice by the 25th of each month of the amount required for the succeeding month. *Held*, to be a severable contract. *Scott* v. *Kittanning Co.*, 159

25. *Sale of stock, subject to division of profits on re-sale.*—Plaintiffs sold to defendant's intestate certain mining stock for a sum paid and "one half of whatever price the same should be sold for, when sold, over and above that sum." In an action to establish the transaction as a trust it was *held*, that the agreement imported an obligation to sell; that the time of sale was optional with the vendee going on his own judgment and discretion; but that after the death of the vendee, the plaintiff could compel a sale and a division according to the contract. *Jones* v. *Kent*, 190

26. *Sale of mortgage bonds—Distribution of proceeds.*—A corporation issued bonds payable to bearer and secured by a mortgage on its property, franchises, etc. The directors authorized Jones to raise money for the corporation and delivered bonds to him as collateral for money he might raise. He borrowed money on his own note, pledged bonds to the lender, and applied the money for the company's use. The property, franchises, etc., were sold under the mortgage. In distribution of the proceeds: *Held*, that the lender was not to receive the full amount of the bonds and account to Jones, but that he was entitled only to his loan and interest. *Rice's Appeal*, 638

27. *Voidable contracts—Option to be exercised in reasonable time.*—The general doctrine regarding contracts between a corporation and one who occupies toward it a fiduciary relation as director, is not that such contracts are absolutely void, but that they are voidable, and that the option to avoid must be exercised within a reasonable time. What is a reasonable time must be decided in each case upon all the elements of it which affect that question. *Twin Lick Oil Co. v. Marbury*, 688

CONTRACT. *Continued.*

See ABANDONMENT, 1; BRICK, 1, 2; LIEN, 1; PLEADING AND PRACTICE, 8; STOCK, 3, 4; SPECIFIC PERFORMANCE, 1; TIME, 1.

CONVEYANCE.

1. *Minerals pass by deed.*—Minerals are a corporeal hereditament, and pass by apt words in a deed, though not susceptible of livery of seizin. *Caldwell* v. *Fulton*, 238

2. *Severance by deed.*—The minerals beneath the surface of land may be conveyed by deed, distinct from the right to the surface. *Id.*

3. *Severance.*—A deed may convey a distinct inheritance in mines, the fee to the land remaining in the grantor. When not severed from the general title they pass with the soil without being expressly mentioned in the deed. *Hartwell* v. *Camman*, 229

4. *Competent grantee—Objection to deed as evidence.*—A deed or bill of sale to a mining company by its name, *e. g.*: "The Guatemala Mining Company," shows on its face a grantee capable of taking, and an argument against its admission in evidence on the ground that the company was not capable of taking, will not be noticed, if the objection in the settled statement fails to specify the point upon which it rests. *Cochran* v. *O'Keefe*, 288

5. *Potentiality of quitclaim deed.*—A quitclaim deed is as effectual to pass the title to real estate as any other, and the purchaser accepting such deed without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty. *Bradbury* v. *Davis*, 398

6. *Identification of the vein—Emery—Iron ore.*—Where there was a grant of the metals and minerals in a certain tract "beginning at the center of the vein of iron ore on the line between, etc.," and in trespass for taking ore there was conflicting evidence as to whether there was any such vein, or whether there was more than one vein, and whether the parties agreed on a line of rocks as marking a supposed vein, and whether, if any vein, it was not a vein of emery instead of iron; *Held*, that if there was one vein of iron ore as called for in the deed, parol evidence could not affect the construction of the deed upon the question of boundary. 2. If more than one vein, parol evidence must show which was intended. 3. If it was a vein of emery or a line of rocks it would be a good boundary under the deed, though treated by the parties as a vein of iron ore. *Chester Emery Company* v. *Lucas*, 343

7. *Description—Lode having two names—Construction.*—A deed which conveys all the grantor's right, title, etc., in and to a certain lode more particularly known as the L. Co.'s claims, located on the Lucerne quartz ledge, *held*, to include all the grantor's interest in the lode notwithstanding the fact that he derived title under two different locations—the Lucerne and the Waller's Defeat—both of which were posted upon and claimed the same lode; and that it was immaterial by what particular name he designated it. Where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the ground in the deed, by courses, distances, or monuments, it can not be controlled by any different

CONVEYANCE. *Continued.*
exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known. *Weill* v. *Lucerne Mining Co.*, 373

8. *Description—Identification of monuments.*—The following description of a mining claim in a bill of sale, "commencing at an oak bush near the gate of Myer's cow-yard, running straight across the river to the head of the wing dam, put in by Owens & Co., in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line," no State mentioned. *Held*, sufficient to allow the paper to be received in evidence, as the points mentioned might be well-known monuments easily found and distinguished. *Meyers* v. *Farguharson*, 217

9. *Specific, controls general, description.*—A deed, conveying lands, or at least the right to mine the ores therein, describing the lands by government subdivisions following the number of the quarter sections with the words, "and known as the Heathcock range," does not give the grantees the right to mine upon another subdivision owned by the grantors, to which the Heathcock range was afterward found to extend. *Ross* v. *Heathcock*, 404

10. *Construction of special contracts.*—The other leases and instruments described in the opinion *construed* not to cover the ore in the land in dispute. *Id.*

11. *Construction—Effect of the word "sold."*—A deed reading, "This deed witnesseth that I * * have this day sold, and by these presents do convey, * * one sixteenth part of my half of all the mineral contained in a certain tract of land, etc. This deed therefore is that I convey * * one sixteenth part, etc.," is by its terms a conveyance of an estate in the mines and minerals, and the word "sold," *ex vi termini*, imports a valuable consideration. *Reaves* v. *Ore Knob Co.*, 369

12. *Construction—Unknown mines—Paint stone.*—By a conveyance of "mines and minerals," the grant does not convey everything in the mineral as distinguished from the animal kingdom; but the expression can not be restricted to "metalliferous ores"; and it includes mineral deposits in strata or beds as well as veins. In this case it was *held* to include a deposit of "paint stone" found on the premises. *Hartwell* v. *Camman*, 229

13. *Deed construed to be a conveyance, not a license.*—A conveyance of a tract of land with "the full right, title and privilege of digging and taking away stone-coal to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is not a license but a conveyance of entire ownership of the coal in place, beneath the adjoining tract. *Caldwell* v. *Fulton*, 238

14. *Deed construed against grantor.*—The rule that a deed is to be construed most strongly against the grantor applied to a forced or judicial deed. *Bushnell* v. *Proprietors Ore Bed*, 258

15. *Two deeds—One indivisible transaction.*—At the time of the conveyance to plaintiff, the registry of deeds showed that his grantor had previously conveyed to the N. J. Co. all of the ores upon the tract. By

CONVEYANCE. *Continued.*

the pleadings it was shown that before the conveyance to plaintiff, the N. J. Co., to correct a mistake, had reconveyed all such ores to plaintiff's grantor, who, on the same day, conveyed back to the N. J. Co. all the *zinc* ores upon the tract, but that the two last mentioned conveyances were unknown to plaintiff at the time he took his deed. *Held*, that these two conveyances constituted one transaction, and that plaintiff could not separate them into parts, and thus acquire a title to the zinc ores through the momentary seizin vested in his grantor by the deed of the N. J. Co., but which was immediately divested by a reconveyance. *Wallace* v. *Silsby*, 390

16. *Granting clause controls habendum—Court to construe deed.*—A deed, which in its granting clause conveyed to the grantee an interest in certain mining ground between Gold Hill ledge and the Butler Peak croppings, recited in the *habendum* that it was intended to convey an interest in all ledges which the grantor owned which would be reached by the grantee in the continuance of a certain tunnel. It was afterward discovered that the description in the *habendum* would include the Gold Hill ledge. *Held*, that an absolute repugnance existed between the granting clause and the *habendum*, and that the grant would be confined to the natural signification of the granting words. *Held*, also, that it is for the court, and not the jury, to interpret written contracts, and when there is no dispute about facts, there is no question for a jury. *McCurdy* v. *Alpha Mining Co.*, 278

17. *Deeds—Interest to be conveyed.*—The phrase: "The interest herein intended to be conveyed," commented upon and explained. *Id.*, 286

18. *Idem—Meaning of word "also."*—The word *also* implies something in addition to what has gone before. *Id.*

19. *Conveyance of freehold estate.*—In North Carolina, freehold interests in lands may be conveyed by a simple deed of grant, and it is not necessary to use livery of seizin or deeds with sufficient consideration to operate under the statute of uses. *Adams* v. *Ore Knob Copper Co.*, 183

20. *Use, distinguished from land.*—An instrument of writing not intended to grant the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of land within the Act of 1795, requiring two witnesses. *McBee* v. *Loftis*, 222

21. *Grant distinguished from license.*—An owner of lands along the line of a contemplated road signed a writing giving to the road company a right to dig and take away gravel to build the road. *Held*, a grant made for consideration and not a revocable license. *Bracken* v. *Rushville Gravel Co.*, 273

22. *Deed by trustees—Evidence.*—A deed executed by the trustees of a corporation with their private seals attached, but without any corporate seal, is not the deed of the corporation, even though it purports to be executed on behalf of the company; and such a deed will not be admitted in evidence unless the trustees first show their authority to execute it. *Gashwiler* v. *Willis*, 516

23. *Sale of corporate property—Power of trustees.*—The trustees of a corporation can only exercise corporate powers when duly assembled and

CONVEYANCE. *Continued.*

acting as a board, and the sale of corporate property requires the exercise of corporate power. *Id.*

24. *Transfer by corporate organization and delivery of possession.*—Where by the mining customs (in Utah, now State of Nevada) the title to a mining claim may be transferred by delivery of possession without deed, the formation by the locators of a corporation and the placing of such corporation in possession, gives it title to the claim, and suit may be maintained to force it to issue stock to the locators, pursuant to the agreement made at the time it was formed and received possession. And such right may be enforced by those claiming under the original locators by descent. *Blodgett* v. *Potosi Mining Co.*, 275

25. *Parol evidence of sale.*—A witness testified that he purchased a mining claim of those who first located it, and held it until he conveyed it to the plaintiff. On cross-examination he testified that both conveyances were by written bill of sale. *Held*, that the writings were the best evidence of transfer, and that the court below erred in refusing, upon motion, to strike out the parol evidence. *Crary* v. *Campbell*, 270

26. *Parol evidence to explain deed.*—The nature and quantity of the interest conveyed by deed, is always to be ascertained from the instrument itself; and is not open to explanation by parol evidence. *Caldwell* v. *Fulton*, 238

27. *Parol evidence—Known minerals.*—Parol evidence is not admissible to show that when a deed was made conveying "all mines and minerals," copper ore alone was contemplated by the parties, or known to exist on the land, so as to restrict the operation of the words of the grant. Parol testimony may be received to explain the technical meaning of such words as "mines" and "minerals," but not to show that the parties to the deed gave any peculiar or restricted meaning to such words. *Hartwell* v. *Camman*, 229

28. *Oral sale of mining claim.*—An agreement by the locators of a mining claim to make an oral transfer of their respective interests in the claim at the time in the adverse possession of another, is not sufficient to pass title. Under such circumstances, a written instrument is necessary. *Copper Hill Mining Co.* v. *Spencer*, 267

29. *An oral sale* is valid only where grantor is in possession, and accompanies the sale with a transfer of possession. *Id.*

30. *Bill of sale—Caveat emptor.*—A bill of sale for a mining claim not under seal, purporting to convey only the interest of the vendor without warranty, conveys only the present right of the maker of such instrument. The purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies in every such case. *Clark* v. *McElvy*, 254

31. *Bill of sale to mining claim—Intent.*—No precise form of words is necessary in a bill of sale. If it be clear that the maker intended to make a bill of sale, and to pass thereby the title to property, the law will, if possible, so construe the words used as to effectuate that intent. *Meyers* v. *Farquharson*, 217

32. *Innocent purchaser.*—The plea of purchaser for valuable consid-

CONVEYANCE. *Continued.*

eration, without notice, must aver the consideration and actual payment of it, which payment must be proved—the averment of a consideration secured is not sufficient. *McBee* v. *Loftis*, 222

33. *Gift—Evidence.*—A bill of sale of a mining claim should not be rejected as evidence because it is given without consideration, when, so far as the court knows, the owner has a full right to give away the claim. *Meyers* v. *Farquharson*, 217

34. *Acknowledgment of deed.*—The acknowledgment to a deed is no part of the deed, and as between the parties to the instrument the deed is good without acknowledgment or record, these being required only for the protection of third parties. *Taylor* v. *Holter*, 322

See ACKNOWLEDGMENT, 1, 23; CONDITION, 1–4; CORPORATION, 4; GIFT, 1; MISTAKE, 1, 2; TENANT IN COMMON, 1, 2, 3.

CORPORATIONS.

1. *Arrangement between organizers as to their interests in the corporation—Advances.*—Where two brothers, contemplating the organization of a corporation, purchased coal lands and mining rights, agreeing at the time to have an equal interest in the company and to make equal advances to it; and after the organization, one of them advanced various sums in paying its drafts and lifting its indebtedness, for which he received credit on the books of the company: *Held*, in action against the company for such sums, that the agreement was intended only to bind each brother to advance equal amounts as loans and not as donations; and even if this were not so, the company was no party to the agreement, could not set it up as a defense, and it could not affect its legal liability. *Merrick* v. *Peru Coal Co.*, 584

2. *Equitable distribution between such organizers.*—If by recovery for advances, plaintiff should obtain an advantage over his brother, by getting more than his fair share of the corporate property, the brother might in equity under the contract, have the rights and burdens of each equalized. *Id.*

3. *Cause of action arising before incorporation of company.*—Thompson contracted to buy an interest in two oil wells; afterward, an oil company was incorporated, to which Thompson transferred all his right, the vendors in the meantime receiving and selling the oil. By agreement, the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company. *Held*, that these facts constituted an original contract between the vendors and the company, and that *assumpsit* could be maintained by the company in its own name for oil received between the time of the contract and the incorporation. *Snow* v. *Thompson Oil Co.*, 15

4. *Taking deed before organization.*—A corporation may take a deed, and the deed will pass title, although incomplete as to its organization, and before officers have been elected. *Vermont M. & Q. Co.* v. *Windham Co. Bk.*, 312

5. *Corporation not held for debt of organizers.*—When a corporation

CORPORATIONS. *Continued.*

is formed, composed partly of the members of a prior association and partly of the members of an older corporation, both parties contributing their property to the new organization, the new company is not liable for the old debts of either party among its organizers. *Paxton* v. *Bacon M. & M. Co.*, 512

6. *Idem.*—The stock of the members forming the old firm would be liable for their debts but the creditors could have no claim on the stock of the other party, nor against the property of the firm. *Id.*

7. *Proof of corporate organization.*—The organization of a corporation may be proved by its records and parol proof without the production of its list of subscribers. *Crump* v. *United States M. Co.*, 455

8. *Fraudulent organization of corporation—Paying up stock by the form of delivering checks which are never presented.*—In consideration of the transfer of mining property by F. & S. (the plaintiffs) to P. (the defendant), the latter agreed to organize a mining corporation and give F. & S. a tenth of the corporate stock; and thereupon the parties, with others, signed articles of association, which articles fixed the amount of the capital stock, divided into shares of equal par value, and specified the portion of the total number of shares to be assigned to each associate, and one tenth of them as belonging to F. & S. This corporation voted to buy the mining property for a price equal to the whole amount of the capital stock, whenever the treasurer should have received the amount from the stockholders; and the purchase was then made, thus: Each associate, except F. & S., gave his check to the treasurer for a sum equal to the total value at par of the number of shares assigned to him, as if in payment for said shares, and P. gave also a check for the shares assigned to F. & S., the treasurer delivered the checks to P., taking in exchange a conveyance of the mining property: P. returned the checks to the drawers upon their paying him "the price which each had previously agreed on for his interest in the property," and "no money was paid in the transaction" except the sums thus paid to P. by the drawers of the checks. The corporation afterward levied an assessment on the capital stock, and voted "that no certificate of stock be issued until said assessment is paid" and a majority of its directors (not including F. & S., or B.) filed in the office of the secretary of the commonwealth a certificate that the amount actually paid in on the capital stock of $500,000 was $175,000, and that it was invested in real estate and machinery. Upon the neglect or refusal of F. & S. to pay the assessment on the shares assigned to them, the corporation sold the shares to pay it. Before the sale, but after the assessment, F. & S. demanded of P. a certificate of their shares; and after the sale brought suit against P. for breach of the original agreement: *Held*, that F. & S. had no cause for action. *Field* v. *Pierce*, 535

9. *Defective organization cured by legislative act.*—Certain persons filed the proper certificate so as to become incorporate under the name of "The Baltimore Chrome Mining and Manufacturing Company." Subsequently its charter was amended by special act of the legislature. The validity of the charter was attacked on the ground of its attempted combination of mining and manufacturing, but it was *held* that the passage

CORPORATIONS. *Continued.*

of the special act and the acceptance thereof removed defects, if any existed, in the original incorporation, and made the corporation valid, *ab initio*. *Basshor* v. *Dressel*, 591

10. *Essential power to contract.*—The power to contract and to bind itself to those dealing with it, in matters within the intent of the charter, is a necessary incident to every mining corporation, and needs no express grant of such power. *Wood Hydraulic H. M. Co.* v. *King*, 618

11. *Powers of president.*—The powers of a president of a corporation extend only to matters arising in the ordinary course of the company business, and he has no authority to make contracts for the purchase of property, unless required in the usual course of business. *Blen* v. *Bear Riv. Co.*, 435

12. *Authority of president of corporation to hire labor.*—Defendant moved for a nonsuit because there was no showing that defendant ever employed plaintiff, or that H., who did employ him, had any authority to act for defendant. *Held*, that the motion was properly denied because plaintiff had testified that he was employed by H., who claimed to act for defendant, and the answer which was verified by H. as defendant's president, admitted that plaintiff went into defendant's employ, and this at least constitutes *prima facie* evidence that H. was authorized to make the contract on behalf of his company. *Steel* v. *Solid Silver Co.*, 155

13. *Representations of president.*—The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may have directed to be sold; and unless appointed agent to sell, his representations are not binding on the corporation. *Crump* v. *United States M. Co.*, 455

14. *Advances by president.*—And for advances in aid of its purchases or business he can sue and recover money loaned. *Merrick* v. *Peru Coal Co.*, 583

15. *Compensation to president for services.*—Without special provision by law or resolution for payment for his services, the president of a mining corporation can not recover therefor. *Id.*

16. *Power to act by directors.*—The general rule is that the directors may do any act within the corporate powers unless restrained by the by-laws or by vote of the stockholders. *Wood Hydraulic H. M. Co.* v. *King*, 618

17. *Directors can not borrow money.*—By the deed of settlement of a mining company the capital was made £50,000, and it was provided "that the affairs and business of the company should be under the sole and entire control of the directors." The deed empowered the directors, if they saw fit, to create new shares by vote at a special general meeting, the capital having been expended. *Held*, that the directors had no power to borrow money on the credit of the company for the necessary purpose of working the mines. *Burmester* v. *Norris*, 449

18. *Personal responsibility of directors.*—The directors of a corporation who willfully abuse their trust, or misapply the funds, or suffer them to be lost by gross negligence and inattention to their duties are to be held personally responsible by the exercise of chancery jurisdiction in favor of the stockholders. *Robinson* v. *Smith*, 443

CORPORATIONS. *Continued.*

19. *Contract of director with company.*—A director of a corporation is not prohibited from lending it moneys when needed for its benefit, and the transaction is open; nor is his purchase of its property at a fair sale under trust deed securing his loan, an invalid transaction. *Twin Lick Oil Co.* v. *Marbury*, 688

20. *Powers of trustees.*—The board of trustees of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority. *Wright* v. *Oroville G. S. & C. M. Co.*, 558

21. *The trustees of a corporation* can bind it only when they are together as a board, acting as such. *Hillyer* v. *Overman S. M. Co.*, 44

22. *Term of trustees under Nevada statute—Time of election.*—The act of March 10, 1865, for the formation of corporations in Nevada, limits the term of trustees named in the articles of incorporation to six months from the date of incorporation, and though the time for holding the election of the next board should be fixed in a by-law, yet such time should accord with the statute, and any discretion exercised by the trustees in the matter should be reasonable and the time fixed at the expiration of the six months or as soon thereafter as practicable. *State* v. *Board Lady Bryan M. Co.*, 526

23. *Officers may deal with it as if strangers.*—When a corporation incurs a legal liability to certain of its officers or shareholders, the private arrangements between such parties are of no more concern to the corporation than if they neither held stock in nor were officers of the company. *Merrick* v. *Peru Coal Co.*, 583

24. *Promise of officer to pay corporate debt—Pleading.*—Evans declared against a corporation and its president and secretary jointly, but showed no evidence of a joint contract by the defendants, nor any special circumstances, except that the plaintiff having mined for the company, the president told plaintiff he would see him paid for it. *Held*, that the action could not be maintained; that the promise of the officer, if it created any contract at all, made a contract of suretyship, and created no joint liability upon the contract of the corporation. *Youghiogheny Shaft Co.* v. *Evans*, 102

25. *Extra pay to secretary.*—The secretary of a private corporation, at a fixed salary, can not recover extra pay for services in that capacity. *Carr* v. *Chartiers Coal Co.*, 476

26. *Recovery by treasurer on audited amount—Usury.*—When the treasurer of a corporation, with the knowledge and consent of the directors, has raised money for the company on his own credit, paying interest above the legal rate, and his accounts, showing such extra interest, have been audited and allowed, a recovery for the balance, including such interest, is not illegal. *Wood Hydraulic Hose M. Co.* v. *King*, 618

27. *Contract of its members with the corporation.*—A shareholder may deal with, sue and be sued by a corporation. If the president buy its paper, he will succeed to the rights of the holders; or if he take up the indebtedness, he may maintain an action for money paid and expended for its use. *Merrick* v. *Peru Coal Co.*, 583

CORPORATIONS. *Continued.*

28. *Corporate acts bind stockholders—Alienation of property.*—Corporate acts, by which corporate property is alienated, if done pursuant to the prescribed mode, and not being in themselves *ultra vires*, are in point of mere law, binding upon the corporate title, and, through that title, equally binding upon the interest of the stockholders. *Wright* v. *Oroville G. S. & C. M. Co.*, 558

29. *Substituting stockholders for corporation.*—This suit having been brought in the name of a corporation, which the chancellor found, in the progress of the cause, to have no legal existence, the individual stockholders were by amendment made parties. *Held*, a proper exercise of discretion in the court below on that view of the case; but that the corporation did in fact exist. *Vermont M. & Q. Co.* v. *Windham County Bank*, 312

30. *Stockholders acting for corporation.*—The stockholders of a mining corporation agreed in writing with S. & K., the defendants, to assign their stock in trust, to be conveyed to S. & K., provided they paid to the trustee a certain sum of money, etc., for the use of the stockholders. A resolution of the board of directors of the corporation also authorized the delivery of the possession of the property to the defendants, and a conveyance to them when they should have fulfilled their contract with the stockholders. *Held*, that it was substantially as if the contract had been made with the corporation instead of the stockholders. *Gordon* v. *Swan*, 84

31. *No power in stockholders to authorize sale.*—The stockholders of a corporation have no power either as individuals or when assembled at a stockholders' meeting, to authorize the sale of corporate property; nobody can convey it unless authorized by the board of trustees when acting as such. *Gashwiler* v. *Willis*, 516

32. *Stockholders' right to redeem mine—Collusion between corporation and creditor.*—A transferred mining ground to a company formed to work it, in consideration of a little less than half the shares (990), the other stockholders holding a majority (1010), but the company agreed to levy assessments and work the mine. Instead of so doing, they allowed a debt to be contracted and the mine to be sold, making no effort at redemption, the president himself being interested in such debts: *Held*, that such conduct amounted to gross fraud upon the vendor. And that the stockholder having redeemed the land from the sale, the corporation should refund to him the purchase money, within a set time with interest, and that otherwise the title should vest in such redeeming stockholder. *Wright* v. *Oroville G. S. & C. M. Co.*, 559

33. *Stockholders not liable to each other for corporate default.*—Five parties formed a coal and oil company, to which they transferred a piece of land owned by themselves. Gehring and Winchester, the plaintiffs, transferred a separate tract which they owned alone. They were to receive from first profits $810 for this piece of land. Before any profits were received, the lands were sold. *Held*, that plaintiffs were entitled to this sum, if it had been received on sale of the lands, as well as if it had come to the company in the shape of profits; but as the bill neither charged the

CORPORATIONS. *Continued.*

defendants (the three other associates) with receiving consideration for the lands, nor profits out of them, it stated no cause of action. *Bainbridge v. Gehring*, 40

34. *Combination by part of stockholders to control corporation.*—F., Y. and B. owned the majority of stock in a company incorporated for the purpose of mining coal, and having leased the company's coal lands as partners, entered into an agreement that they would determine among themselves as to the directors and other officers of the company, and if they could not agree they would ballot for such officers, that the majority should rule, and their vote be cast as a unit so as to control the election. *Held*, that this agreement was not void, as against public policy; the persons owning a majority of the stock have a right to combine and thus control the selection of officers and management of the property. *Faulds v. Yates*, 551

35. *Corporation may contract, without seal.*—Trading corporations may bind themselves by contract without the use of the corporate seal. The old rule as to corporations contracting only by corporate seal no longer exists as to trading companies. *South of Ireland Co. v. Waddle*, 583

36. *Scroll seal to contract of corporation—Waiver—Variance.*—A contract was signed "Wolf Creek Co. per J. K. Siegfried, Supt. [seal] (a scroll seal) and also with the names and seals of the other parties, who were individuals. *Assumpsit* was brought against the company for breach of the contract; the declaration was on a parol contract; the written contract was given in evidence without objection. *Held*, to be a waiver of the point that the instrument was a specialty. Variance can only be taken advantage of when evidence is offered. To raise the question of the form of action after that, it should have been proved affirmatively that the scroll had been recognized as the seal of the company. *Wolf Creek Co. v. Schultz*, 95

37. *Novation—Assumed contract.*—Where there is an agreement between the organizers of a corporation, that the corporation shall assume their debts, or if the corporation assumed, upon sufficient consideration, to pay the creditors of its composers, the action could be maintained against the corporation as an action upon its own contract. *Paxton v. Bacon M. & M. Co.*, 512

38. *Void lease—Corporate knowledge—Receipt of royalty.*—Where the president of a mining company, without authority from the corporation, leased the mine to a party who entered and paid royalty from time to time, but this royalty was entered by the superintendent upon the books of the company as money for ores sold: *Held*, that the lease being made without authority was void; and that the receipt of royalty in the manner stated could not be considered a ratification because it showed that the rent or royalty was not received with a knowledge of its rental character. *Held, further*, that the knowledge of three of the board of trustees, being less than a majority, of the facts in regard to the party claiming as tenant, could not be considered the knowledge of the company; and the court intimated that knowledge by all the trustees not communi-

CORPORATIONS. *Continued.*

cated to them as a board would not be knowledge of the company or of the trustees as a board. *Yellow Jacket Co.* v. *Stevenson*, 545

39. *Corporate authority a trust.*—The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. *Wright* v. *Oroville G. S. & C. M. Co.*, 558

40. *Corporate title where vested.*—The legal title to the property of a mining corporation is vested in the corporation and not in the stockholders as such. *Id.*

41. *Corporation held to representations of agent.*—A corporation is bound by the misrepresentations of its agent authorized to sell, though of limited powers, and although they were neither authorized by nor known to the company. *Crump* v. *Un ted States M. Co.*, 455

42. *Admissions by corporations.*—A corporation accepting the services of a person as treasurer, and ratifying and auditing his accounts, which show a balance against the company, is bound by the admission in like manner as an individual would be. *Wood Hydraulic Hose M. Co.* v. *King*, 618

43. *Ratification of purchase made by president.*—The president of a corporation, who was also one of its trustees, purchased certain ditches and water privileges on behalf of the company, and immediately thereafter at a meeting of the trustees reported in writing that he had made the purchase, and set forth some of the terms of the contract, whereupon the trustees voted to ratify the report and proceedings. *Held*, that notwithstanding the incompleteness of the written report relative to the terms of the contract, it would be presumed that the matter was fully inquired into and explained at the meeting, and a party claiming that there was a mistake or misapprehension must show the fact. *Blen* v. *Bear River Co.*, 435

44. *Ratification—Sale of old stock instead of issuing new.*—The stockholders ordered the directors to create new stock and sell it; instead thereof the directors acquired original stock and sold it. *Held*, that such act might be ratified subsequently by the stockholders so as to render the sales valid and binding upon the purchasers. *Crump* v. *United States M. Co.*, 455

45. *Power to transfer the entire corporate property.*—By the company deed large powers were conferred on the board of directors, and it was provided that in the case of any doubtful action, on their part, the same, if submitted to a shareholders' meeting and approved by a two thirds vote, should be binding upon every shareholder, whether under incapacity or not. After nine years unsuccessful operations, the directors were ordered by a two thirds vote of a shareholders' meeting, to lease the entire works for a period of twenty-one years. *Held*, that the lease was within the powers conferred, and was a proper method of endeavoring to make the most out of the assets of the company. *Featherstonhaugh* v. *Lee Moor Co.*, 496

46. *Corporation, when a necessary party.*—In a suit against its direct-

CORPORATIONS. *Continued.*

ors for fraud and mismanagement the corporation is a necessary party either as complainant or defendant. The corporation in itself is the proper party plaintiff, but if the corporation refuse, stockholders may sue, making the company one of the defendants. *Robinson* v. *Smith*, 443

47. *Collateral attack on charter.*—In an action by a corporation the question of its having forfeited its charter is not open for inquiry unless the forfeiture has been ascertained by the sentence of a court in a proper proceeding for that purpose. *Crump* v. *U. S. Co.*, 454

48. *Violations of charter not collaterally investigated.*—A contract made by a corporation, which is not authorized by its charter is not void, and its validity can not be investigated in a collateral way by individuals; it must be done by the government in a direct proceeding. *Union Water Co.* v. *Murphy's Flat Co.*, 488

49. *Irregular corporate action.*—Where, the stockholders being only three persons, no formal votes were taken by the directors as a board, nor were officers re-elected, and all proceedings were informal, these facts did not cause the corporation to cease to exist nor deprive it of its rights in the premises. *Vermont M. & Q. Co.* v. *Windham County Bank*, 312

50. *Irregular by-laws made valid by user—Election of trustee a corporate act.*—The board of trustees of the O. S. M. Co. consisted of seven members. At a meeting at which only six were present it was voted to elect a trustee to fill the vacancy; the vote resulted in a tie, whereupon the president of the board, having voted as a trustee, claimed the right to give the casting vote under one of the by-laws of the corporation, and voting again for Lyle, one of the two candidates, declared him duly elected trustee; and thereupon Lyle, against the protest of three of the trustees, proceeded to act as a member of the board, and to vote with the others for the election of a superintendent. Upon an application by the superintendent, so elected, for a writ of mandamus to remove the prior superintendent it was *held*, that the by-laws, although adopted by the stockholders, instead of the trustees, yet, having been properly recorded in books kept by the trustees, and acted upon both by them and the stockholders for a long period of time, must be treated as the regular by-laws of the corporation, but that this particular by-law was void, because contrary to the charter which provided that a majority of the board must decide upon corporate acts, the election of a trustee being a corporate act. *State of Nev.* v. *Curtis*, 630

51. *Corporation contracting in foreign State.*—Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board even though the meetings of the board were held out of the State chartering the company. *Wood Hydraulic H. M. Co.* v. *King*, 618

52. *Ultra vires: iron company enjoined from building flour mill.*—A company organized to manufacture pig iron undertook to erect a flour mill, which the plaintiff, a stockholder, sought to prevent by injunction. *Held*, that the right to use the corporate funds depends upon whether the

CORPORATIONS. *Continued.*

use is incidental to the corporate object (as to feed the men and animals employed), or whether it is a leading object in itself (as to grind for the public generally), and under the evidence the injunction granted below was allowed to stand. *Cherokee Iron Co.* v. *Jones*, 626

53. *Lease does not determine corporation.*—The cessation of all operations for a certain time, or the letting of the entire corporate property to strangers for a definite period, is not necessarily an abandonment of the purposes of a mining company. *Featherstonhaugh* v. *Lee Moor Co.*, 496

See ACKNOWLEDGMENT, 3; AGENT, 3; ATTORNEY-AT-LAW, 1; CONVEYANCE, 23, 24; FRAUD, 1, 2, 3; OFFICER, 1; STOCK; ULTRA VIRES.

DELIVERY—See CONTRACT, 20

DEMAND.

1. *Waiving time of, without waiving right to, demand.*—Where under contract the buyer was to call for coal on a certain date of each month and for certain quantities, and the first deliveries were made at irregular periods and in irregular quantities, but never except upon demand —such course of dealing did not release the buyer from his duty to make demand. *Scott* v. *Kittanning Co.*, 159

DESCRIPTION—See CONVEYANCE, 7, 8, 9.

DITCH.

1. *Mortgage of flume—Indivisibility—In the nature of real estate.*—A mortgage upon a mining ditch or flume in course of construction, and purporting to grant, not only the work as it stood, but as it should be when completed. *Held*, valid as against the entire flume, and not to be limited to the part constructed at its date, in favor of a later mortgage. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon. *Union Co.* v. *Murphy's Flat Co.*, 487

EASEMENT.

1. *Possession, by the owner of an incorporeal hereditament,* is not necessary to be proved, in his action on the case for being disturbed in its enjoyment. *Union Pet. Co.* v. *Bliven Pet. Co.*, 107

2. *Grant of right to flow tailings.*—The plaintiff conveyed to defendants the right to discharge dirt from their ore washing on his meadow lot. The tailings accumulated and spread so as to flow down upon the plaintiff's pasture lot, which lay below. *Held*, that the damage was an incident to the grant and that defendant was not liable. *Bushnell* v. *Proprs. Ore Bed*, 258

3. *Incidents to grant.*—A grantor is presumed to convey everything incidental to the enjoyment of the grant, so far as the same may be in his power to yield. *Id.*

EJECTMENT.

1. *A first judgment in ejectment* is not conclusive against either parties or privies, nor against persons holding easements upon the land. *Union Pet. Co.* v. *Bliven Pet. Co.*, 107

EQUITY.

1. *Equity looks beyond the forms of law.*—In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been exercised, in good faith, to promote the interest of the stockholders. *Wright* v. *Oroville Co.*, 558

2. *Notice of deed carrying equities.*—Notice of a deed brought home to its attorney or its cashier is notice to the bank he represents; and notice of a defective deed is notice of its equities and that chancery might reform and enforce it. *Vermont Mining Co.* v. *Windham Bank*, 312

3. *Attachment on land defectively conveyed.*—An attachment on land described in a deed which was invalid for want of sufficient attestation, will not prevail against the right of the grantee therein to have the same reformed. *Id.*

4. *Order concerning use of tunnel—Power of court to vary terms of contract.*—An order of court determined the rights, under contract, of the M. I. O. Co. and of Trotter to the use of a tunnel, by which Trotter's rights were declared to be superior to those of the company, but the latter was declared to have the exclusive right to the tunnel for a certain period in each year for the purpose of mining zinc ores, and as a necessary incident thereto of removing franklinite, although its contract called for zinc alone, while Trotter's called for franklinite. The order was based upon the mistaken idea that the supply of franklinite was very large. *Held*, that a further exercise of the incidental right to remove franklinite by the M. I. O. Co. would deprive Trotter of the benefit of his contract, and that he could not be compelled to accept an offer from the M. I. O. Co. of one half the quantity of franklinite he was authorized to take, on payment for the cost of mining it. A court has no power to engraft new provisions upon a contract against the will of one of the parties. *Manganese Co.* v. *Trotter*, 132

See SPECIFIC PERFORMANCE, 1; STOCK, 10.

EVIDENCE.

1. *Burden of proof.*—When by law or contract a duty is imposed upon a party the burden of relieving himself of that duty rests upon himself. *Cook* v. *Andrews*, 171

2. *Parol evidence not admissible to vary written instrument.*—Parol extrinsic proof is not admissible to show that parties who have by deed conveyed all the water of the right-hand fork of Oro Fino gulch intended to convey the water of the left hand fork. The rule is to give effect to the intention of the parties if the words they employ will admit of it, but nothing can be added to or taken from the written words. *Taylor* v. *Holter*, 322

EVIDENCE. *Continued.*

3. *Direct proof of a fact* overcomes all presumptions to the contrary. *Hillyer* v. *Overman Co.*, 44

4. *Admissions* of legal conclusions made in ignorance of a party's legal rights are not conclusive. *Merrick* v. *Peru Coal Co.*, 584

5. *Proof to supersede written contract.*—A verbal agreement or contract may be proved superseding previous written agreement, but it must be established clearly and not by loose and vague testimony. *Ross* v. *Heathcock*, 404

6. *Rule as to admission of altered instruments.*—Where an alteration is such as to defeat the tenor of an instrument, it must be explained before it is allowed in evidence. In other cases, it goes to the jury without such proof. *Cheney* v. *Barber*, 66

7. *Entirety of conversations.*—If part of a conversation is given in evidence by one party, the opposite party is entitled to bring out the rest of it. Nor can it make any difference whether the part is brought out by direct examination of a party's own witness or the cross-examination of the witness of his adversary. *Wolf Creek Coal Co.* v. *Schultz*, 95

8. *Surrounding circumstances.*—In cases of construction, facts existing at the time words are used, may be proved as a key to their meaning. *Richards* v. *Schlegelmich*, 78

9. *Under the plea of non-assumpsit*, the defendant is entitled to give any evidence which shows that plaintiff has no right to recover; and in this case the court erred in refusing testimony that plaintiff had fraudulently substituted inferior coal for that which it contracted to deliver. *Scott* v. *Kittanning Co.*, 159

See AGENT, 2; CONTRACT, 13; PLEADING AND PRACTICE, 10.

FORFEITURE.

1. *Discovery of facts warranting forfeiture.*—The objection that a discovery may subject the corporation to a loss of its charter is not sufficient to support a general demurrer to the whole bill. *Robinson* v. *Smith*, 443

See CONDITION, 4.

FRAUD.

1. *Fraud—Credit Mobilier Contract.*—Ahl and Jones projected and organized a railroad and mining company in order that Ahl might sell his lands to the company, and Jones build a railroad for it. They owned most of the stock, controlled the corporation absolutely, and co-operated with each other in selling the land and contracting for building the road. *Held*, that the burden was on them to show the fairness of the transaction, and under the facts of the case it was decreed that the sale of the land by Ahl to the company was a fraud in fact and in law. *Ahl's Appeal*, 639

2. *Fiduciary parties making profit.*—Promoters, directors or agent of a company are not permitted to make profit out of it in buying lands or dealing with it. *Id.*

3. *Confidential relation of members of association—Accounting.*—But from the time persons form or begin to start such association, they stand in a

FRAUD. *Continued.*

confidential relation to each other, and to future members, and none of them can purchase property for the purpose of the association, and sell it at an advance, without a full disclosure of all the facts. Such persons must account to the company for the profits. *Densmore Co.* v. *Densmore*, 569

4. *Vendor and purchaser—Fraud.*—Persons who own property of any kind may form an association with others and sell it at any price, without regard to the original cost, if there be no fraudulent misrepresentation. The vendors are not bound to disclose the profits which they may realize. They are not agents or trustees in their original purchase, and there is no confidential relation which affects them with a trust. *Id.*

5. *Misrepresentations, without intent to defraud.*—In written proposals for a sale of stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, the contract may be avoided, whether the vendors knew the representations to have been false or not; and whether made with or without a fraudulent intent. *Crump* v. *U. S. Co.*, 454

6. *Suppression of facts.*—In such a case, the suppression from the proposals of any fact within the knowledge of the vendors materially affecting the value of the stock and inconsistent with the statements given in the proposals, vitiates the contract as fully as the false affirmation of facts. *Id.*

7. *Subsequent failure of the mine.*—If the representations were materially true, and no facts suppressed, the subsequent failure of the mine does not impair the right of the vendors to enforce the contract. *Id.*

8. *Fraud—Rescission.*—To avoid a contract on the ground of fraud, the offer to rescind should be made as soon as the fraud is discovered. The vendee can not remain quietly enjoying the property for a long period of time after the discovery of fraud, and afterward repudiate the contract. *Blen* v. *Bear Riv. Co.*, 435

9. *The false statement by vendor of the cost* to him of an article which he is about to sell is a case of moral but not of legal turpitude, and will not sustain an action for deceit. *Scott* v. *Kittanning Co.*, 159

10. *Proof of understanding in cases of fraud.*—On an issue between A and B as to whether B was induced to pay A money upon his false representations that it was needed for a certain stated purpose, if A contend that B, when he made the payment, did not understand that the money was to be used for that purpose, but for another purpose, it is competent for B to testify that he paid the money, supposing that it was to be applied to the first purpose. *Brown* v. *Pease*, 46

See CORPORATIONS, 8, 34; RESCISSION, 4.

GIFT.

1. *Title by gift.*—The title to a mining claim obtained by gift can not be assailed by one who is neither a creditor of the grantor, nor in the place of creditors. *Meyers* v. *Farquharson*, 217

See CONVEYANCE, 33.

GOLD DUST—See WARRANTY, 1.

GRANT—See EASEMENT, 3.

INJUNCTION.

1. *Injunction at suit of stockholder.*—A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred. *Wright* v. *Oroville Co.*, 558

2. *Idem.*—The court will interfere to relieve an injured stockholder from loss after such an act has been done, provided no superior equity has intervened, nor the rights of innocent third parties attached. *Id.*

See MISTAKE, 1; PARTNERSHIP, 1.

INTEREST.

1. *Interest not allowed after laches.*—Each party used the ore without requiring the other to account, and there was no known excess to be paid for as the business progressed. Being a voluntary delay of both, interest was properly chargeable only from the time the balance was struck. *Grubb's Appeal*, 416

JUDGMENT—See EJECTMENT, 1.

JUROR; JURY.

1. *Challenge to juror because of opinion as to course of veins.*—Where a juror upon his *voir dire*, expressed the holding of a decided opinion as to the course of all the veins in the vicinity of the ground in controversy, but had no knowledge of the particular vein or veins in dispute, and it did not appear upon the pleadings nor otherwise, before trial, that the course of the veins was a material fact in issue. *Held*, that the challenge for cause to such juror was properly disallowed. *Weill* v. *Lucerne Co.*, 372

See PLEADING AND PRACTICE, 11; POSSESSION, 3.

LACHES.

1. *Rescission—Fluctuations in oil.*—Petroleum being an article subject to speculation with the varying market price, a rescission of a contract for its delivery must be made within a reasonable time after grounds of rescission arise. Parties can not take the chance of a rise in the price and elect to deliver or not to deliver accordingly; a month's delay in such case upon a series of contracts for monthly deliveries of oil is an unreasonable time. *Morgan* v. *McKee*, 128

2. *Sale under trust deed—Purchase by director—Laches peculiarly incident to property such as oil wells.*—Upon a bill to set aside a trust deed sale of certain oil well property, which had been granted to a director as security for a loan, it was *held* that oil wells are a species of property which is, more than any other, subject to rapid, frequent and extreme fluctuations in value, and that the bill was properly dismissed, it appearing that there was no fraud committed by the director who purchased, and that the bill was not filed until nearly four years after the sale, when

LACHES. *Continued.*

the skill and money of the purchaser had made the property valuable. *Twin Lick Co.* v. *Marbury* 688

See INTEREST, 1.

LEASE.

1. "*Work free of expense.*"—The power to "work free of expense" entitles the party to work in any manner he thinks proper by himself his servants, agents or assignees. *McBee* v. *Loftis*, 222

2. *Tenancy at will.*—The rule that one who enters under a void lease is to be deemed the tenant at will, and so entitled to notice to quit, does not apply when the entry is unauthorized. *Yellow Jacket Co.* v. *Stevenson*, 545

See CONTRACT, 9, 10; CORPORATIONS, 38; STOCK, 2.

LICENSE.

1. *License to take ore.*—A contract which merely grants a right to take ore, no estate or interest being granted, is simply a license, but if coupled with an interest growing out of expenditures made pursuant to its requirements, the license can not be revoked at the pleasure of the licensor. Such a license is not exclusive of the licensor, unless expressed in such words as to show it to be the intention of the parties, or unless the implication is so clear and strong as to be unavoidable. *Silsby* v. *Trotter*, 137

2. *Licensee's right to use of tunnel.*—One who constructs a tunnel for the purpose of mining ore under a license from another with an understanding that he is to be reimbursed for his outlay from the licensor's share of the ore mined, has the right to the exclusive use of the tunnel, by implication, if in the exercise of reasonable diligence such exclusive use is necessary to enable him to mine the quantity of ore named in the license within the time limited. *Id.*

See CONVEYANCE, 13, 21.

LIEN.

1. *Bonds tendered as security for purchase money of land and refused.*—Ahl sold land to the company; as part of the consideration he was to receive bonds secured by a second mortgage to be issued; he delivered the deed; judgments were confessed by the company, after which the mortgage was executed. The bonds were tendered to Ahl; he refused them because of the judgments; the bonds were then otherwise appropriated by the company. *Held*, 1. That the setting apart of the bonds to Ahl gave him no claim for their amount in the distribution; 2. That in the distribution it was a question of lien, and Ahl had no lien; the mortgage having been given to secure the bonds, and Ahl not owning them, he had no lien, equitable or legal, through the mortgage for the purchase money for which the bonds were to be delivered to him. After his rejection of the bonds he had no further claim on them; the company could dispose of them as they pleased. He had only a right of action against the company for the purchase money. *Ahl's Appeal*, 633

LOCATION—See RELOCATION.

LOCATION CERTIFICATE.

1. *Location notices should be liberally construed*, having reference to the circumstances under which, and the character of the parties by which they are generally made. *Weill* v. *Lucerne Co.*, 372

LODE.

1. *Lode; dips, spurs, and angles.*—The use of the words "dips, spurs, and angles," in a notice of location clearly indicates that it is a lode which is claimed, and not a hill or surface location. *Weill* v. *Lucerne Co.*, 372

See CONVEYANCE, 7.

MANDAMUS.

1. *Mandamus compelling an election.*—The omission to adopt such a by-law is no excuse for a failure to call the election, and the neglect for two months after the expiration of the first six months to call the election is a clear neglect of duty, the performance of which may be compelled by mandamus. *State* v. *Lady Bryan Co.*, 526

2. *Neglect of one duty no excuse for neglect of another.*—Where a board are bound to fix by by-law the time for holding an election, the neglect to pass the by-law is no excuse for failing to hold the election, and no reason to defeat a mandamus to compel such election. *Id.*

3. *Where an election is commanded by mandamus*, all preliminary matters incident to such election are by implication commanded by the writ to be done. *Id.*

4. *Petition for mandamus construed.*—A petition for mandamus is to be governed by the rules controlling the pleadings in an ordinary action, and in this case *held* not so defective as to warrant the refusal of the writ. *Id.*

5. *Expulsion of trustees no excuse for failure to elect board.*—The stockholders voted to expel the old board of trustees and elected a new board. *Held*, that such fact was no answer to the petition for mandamus, because if such action was illegal it was void and of no effect; and if valid it did not obviate the necessity of an election. Where all the members of a board have been evicted, the board continues its existence; its individuals only are changed, and such change can not affect the right to the writ. *Id.*

MEASURE OF DAMAGES.

1. *Distinction between penalty and liquidated damages.*—Whenever the stipulations of a contract are intended as a measure to determine the amount of a loss, in its nature uncertain, and difficult to be ascertained, it is held to be a liquidation of damages, and not a penalty. *Wolf Creek Co.* v. *Schultz*, 95

2. *The rule of damages on breach of covenant for seizin* is, generally, the consideration money, with interest, if the grantee has taken nothing by his deed; but if by subsequent conveyance the title is perfected in the grantee, he can recover but nominal damages. *Hartford Co.* v. *Miller*, 353

MEASURE OF DAMAGES. *Continued.*

3. *Difference of price, when an insufficient measure.*—The simple rule that the measure of damages is the difference between the contract price and the market price at the time the contract ought to have been completed, would be inadequate in a case like this. In this case nothing short of the value of the contract would be a compensation, to be determined by deducting from the contract price the cost of delivery, including the royalty and the value of the coal as it remained in place. *Scott* v. *Kittanning Co.*, 159

4. *Failure to deliver telegram—Measure of damages.*—The defendant having received a message for transmission over its lines, without notice that extraordinary care or speed in its dispatch or delivery was important, will not be held liable for the special damages resulting from a delay in delivery or mistake in the message, but only for natural and ordinary damages, the special damages for the non-delivery of the message being too remote. *Baldwin* v. *U. S. Co.*, 70

See WARRANTY, 1.

MINERALS—See CONVEYANCE, 1, 12; MISTAKE, 2.

MISTAKE.

1. *Misdescription of ore vein; mistake—Injunction against suit on warranty, pending reformation.*—A, the owner of a lot of land upon which were certain ores, conveyed to B all the iron ores, metals and minerals in and upon a portion of the lot, describing it by metes and bounds, with a right of entry to dig and carry away the ores. Subsequently A conveyed by warranty deed, all the minerals upon the whole lot to C, describing it by metes and bounds, with a right of entry to dig and carry away the ores; reserving all rights conveyed to B by the first deed. The property described in the second deed was in fact bought by B and C upon joint account, and C took the deed in trust for himself and B. While the property was so held, B and C negotiated a sale of an undivided third part thereof to D, and thereupon C executed a deed of warranty to B and D, conveying to each an undivided third part of all the rights described in the second deed. This third deed was intended as an execution of the trust above mentioned by conveying, for the joint benefit of C and B, to D the share which he had purchased, and also to B the share to which he was equitably entitled. The scrivener who wrote this deed, without any instructions relative to the reservation in the second deed, from which he copied, left it out, supposing it to be immaterial. B, C, and the scrivener, all supposed that no part of the iron vein described in the first deed was included by the description in the second deed. D knew nothing about the iron vein or the first deed. Afterward C and D each conveyed their respective interests to B, so that he became the sole owner, subject to a mortgage by him to D. It was determined in an action by E, who had become the owner of the rights described in the first deed, against B for trespass, that the minerals described in that deed were upon the land described in the second and third deeds. B paid the judgment recovered in that action against him and commenced an action at law against C for breach of the covenants contained in the third deed. On a bill in equity,

MISTAKE. *Continued.*

brought by C against B and D, to reform the third deed so that the property and rights described in the first deed might not be included therein, and that B might be restrained from prosecuting his action against C. *Held*, that C was entitled to an injunction restraining B from setting up the covenants in the third deed, as applicable to the vein of iron ore, so far as regards one undivided half of the premises, viz., the one third conveyed to B, and one half of the third conveyed to D, and also restraining B from prosecuting his action against C, except so far as might be necessary to ascertain the amount of damages, until B should have procured D's assent to such a reformation of this deed, or to such a release as would secure C's rights. *Wilcox* v. *Lucas*, 380

2. *Reformation of mistake in reservation—"Mines" includes more than "minerals."*—M. by his deed conveyed the land and one seventh of the ore right with covenant against incumbrances, and with this clause "it being understood that the said Holley heirs own the six sevenths of said ore and minerals." But the ore right of the Holley heirs included also the right to use the surface in mining; and in the executory contract from which the deed had been drawn it was expressed as "six sevenths of the iron ore mines upon said land." The mistake was that of the scrivener who wrote the deed. *Held*, that the deed should be reformed so as to make this clause read as expressed in the contract. *Hartford Co.* v. *Miller*, 353

See CONVEYANCE, 6.

MORTGAGE.

1. *Foreclosure—Duty of court.*—In a suit to foreclose a mortgage in which other lien claimants are parties, it is the duty of the court to determine the relative rights of all the parties. *Johnson* v. *Badger Co.*, 386

2. *Probate sale of mortgaged property.*—The Probate Court has no power to foreclose a mortgage, and sales of mortgaged property made under its orders pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired; the purchaser at such sale can not take by relation the title which the decedent had at the date of the mortgage. *Meyers* v. *Farquharson*, 217

3. *Statute of limitations.*—An action to foreclose a mortgage, no written obligation to pay the money secured by it having been executed, is, nevertheless, an action founded upon an instrument of writing, and is not barred until four years after the cause of action accrues. *Union Co.* v. *Murphy's Flat Co.*, 487

See DITCH, 1.

NOTICE.

1. *Notice by record.*—That the title of the grantor, as it appears in regular sequence and unbroken continuity on the record, is a fact within the consciousness of the grantee at the time that he accepts his conveyance, is a conclusion *juris et de jure*. *Wallace* v. *Silsby*, 390

2. *A party having notice of the contents* of a writing has notice of its legal effect. *Van Dusen* v. *Star Quartz Co.*, 26

OFFICER.

1. *Officer de facto, defined.—Held, also,* that the acts of Lyle could not be sustained as an officer *de facto,* because it is upon the principle that third persons, not cognizant of the fact, must be protected, that such acts are sustained, and in this case all parties interested had knowledge that Lyle was not an officer *de jure.* To create an officer *de facto* it is necessary that he should be in peaceable possession of the office, actually exercising the functions of an officer; it is not sufficient that he has intruded himself by force. *State* v. *Curtis,* 630

OIL—See CONTRACT, 5, 6; LACHES, 1, 2

OPTION—See CONTRACT, 27.

PARTIES.

1. *Joint action by stockholders.*—Stockholders suffering a common injury are not required to bring separate suits. *Robinson* v. *Smith,* 443

2. *Non-joinder of defendants.*—The non-joinder of some who should be parties is not ground for general demurrer to a bill, for that may be cured by amendment. *Hand* v. *Dexter,* 608

3. *A demurrer for want of parties* is good only when the defect appears on the face of the bill. *Robinson* v. *Smith,* 443

See CORPORATIONS, 46; PARTNERSHIP, 6.

PARTNERSHIP.

1. *Reservation—Injunction.*—A contract relating to a marble quarry, by the terms of which B. was to quarry the marble and furnish it for R.'s mill, who was to manufacture it for market, the net proceeds to be equally divided. *Held,* to be a contract of partnership; and that a clause reserving the right in R. to enter and quarry all the marble he might want in case B. failed to fulfill the stipulations in the contract, did not justify R. in making such entry by collusion with strikers who had refused to work for the plaintiff company, the assignee of B., when R. had been supplied with marble as rapidly as the contract called for, and that R. would be restrained by injunction from intruding upon the possession of plaintiff for such cause; but that the injunction should be so construed as to leave his reserved right untrammeled. *Rutland Co.* v. *Ripley,* 291

2. *Connecting telegraph lines.*—The fact that two telegraph companies have co-terminal lines, and that one of them, as required by law, received messages from the other for transmission over its lines, does not render them partners nor mutual agents; and each, in the absence of a special agreement, will be liable for its own acts, but not for the acts or defaults of the other. *Baldwin* v. *U. S. Co.,* 70

3. *Real estate, not partnership property.*—Parties owned ore land as tenants in common; they entered into partnership in manufacturing iron and bought other real estate. The proceeds from the land and the purchase money of the real estate were carried into the firm books with the partnership transactions. *Held,* that these circumstances did not make the land and the proceeds firm property. *Grubb's Appeal,* 416

4. *Purchase of coal lands by one partner with partnership funds—Conveyance compelled.*—Real estate belonging to a partnership will in

PARTNERSHIP. *Continued.*

equity be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership, and be made to account to the other partners. So where coal lands were purchased by one of three partners in his own name, but with money contributed in equal proportions by all parties, upon a dissolution it was held proper to compel the partner holding the title to convey to his co-partners their proportionate interest. *Faulds* v. *Yates*, 551

5. *Specific relief against partner.*—In a suit between partners to compel the conveyance of land, it will be granted only upon the specific terms of the agreement for the purchase; and if the purchasing partner states that he paid a larger price than in reality he did pay, and thereupon his copartners advance more than their proper proportion of the purchase money, the partner making such misrepresentations, can not, in such a a suit, be compelled to refund the excess. *Id.*

6. *Parties.*—In such a suit the corporation is neither a necessary nor proper party. *Id.*

See STOCK, 8; TENANT IN COMMON, 4-7.

PERSONAL LIABILITY—See CORPORATIONS, 18; STOCK, 9.

PLEADING AND PRACTICE.

1. *Stock sale—Efficiency of the common counts where a recovery is allowable upon either view of contested facts.*—In this case the evidence was such as to warrant the jury in finding that there was an understanding by which C. authorized D. to sell his stock at the same price as he sold for himself, and that in pursuance of it C. delivered 56 shares of his stock to D. for the purpose of such sale; or they might find, independent of any such understanding, that the proposition on which C. parted with those shares was that "certain Western parties wanted to buy a majority of the stock," and that D. was negotiating the sale for himself and others, and that $40 per share was named, not as the price of sale to D., but as the highest price which could be obtained from the "Western parties"; and upon either of these findings C. would be entitled to recover the price for which his stock was in fact sold, upon the common, disregarding the special, counts. *Cutter* v. *Demmon*, 119

2. *Pleading—Essential averments.*—The non-averment of an essential fact will prevent recovery although no demurrer be interposed on this account. *Cook* v. *Andrews*, 171

3. *Pleading—Instructions.*—In an action by B. against P. to recover money paid under the foregoing contract, the declaration contained two counts in tort and one in contract, all for the same cause of action. *Held*, that after striking out certain portions of the declaration, it still set forth a good cause of action. *Held, also*, that the court properly refused certain instructions asked by P., which are fully set forth in the body of the case as reported. *Pease* v. *Brown*, 46

4. *Instruction at variance with evidence.*—The court instructed the jury in substance as follows: If plaintiff went upon defendant's mine to

PLEADING AND PRACTICE. *Continued.*

work in June, 1876, with the understanding with defendant that he was to receive reasonable wages from the mine itself, without looking to the company personally, and after doing preparatory work the plaintiff was discharged without cause before he had taken out reasonable wages, the company is liable to the plaintiff for such reasonable wages less the amount received from the mine.

The evidence showed that there was no such agreement prior to July 5, 1877, but that plaintiff had worked the mine up to that time with the knowledge of the company, and without objection, after which there was some such oral understanding. *Held*, that the court had no right to extend such contract back to the 6th of June, 1876, and that the instruction was not authorized by the pleadings and evidence. *Sargent* v. *Linden Co.*, 207

5. *Misleading instruction.*—It is error to give an instruction which is sound as a proposition of law, if there is no legal evidence on which to base it. Such an instruction is misleading. *Mining Co.* v. *Bruce*, 146

6. *Charge overlooking the merits—Recoupment of loss to furnace.*—In an action on such contract which omits all, or any but indifferent reference, to the defense relied on, to wit: counter claim of failure to manufacture iron on account of non-delivery of coals, misses the points of the case, fails to enlighten the jury, and can not be sustained. *Burton* v. *Wilkes*, 88

7. *Memorandum to jury.*—A judge has no right to hand to the jury a memorandum of plaintiff's claim against the wish of the opposing party. *Id.*

8. *Alteration of contract—Demurrer to bill.*—A lead company filed a bill to enjoin an ejectment from premises, of which it was the lessee by assignment, and also to correct a mistake in the lease in the description of the premises. Defense by demurrer that the lease had been forfeited by an erasure therein. *Held*, that as it did not appear from the face of the bill that defendant was not a party to the erasure, the demurrer was erroneously sustained, and that defendant must raise the question by answer. *Rose Clare Lead Co.* v. *Madden*, 42

9. *Demurrer ore tenus* allowed—and defined in note. *Robinson* v. *Smith*, 443

10. *Evidence taken before substitution.*—Whether testimony taken before new parties are brought in, can be read on the hearing depends on the circumstances, and was properly allowed in this case. *Vermont Co.* v. *Windham County Bank*, 312

11. *Jury of six.*—In the trial of issues of fact in the County Court of Colorado under statute of Feb. 13, 1874, p. 213, a party who desires a trial by a jury of twelve must demand a jury of that number before the *venire* is issued, and if the record fails to show such demand, or a waiver of any jury, then a trial by a jury of six will be proper. *No. 5 Mining Co.* v. *Bruce*, 146

12. *Interested witnesses.*—The exception to the general rule which forbids interested members of a corporation from testifying on its behalf is confined to keepers and depositaries of corporate documents. Members

PLEADING AND PRACTICE. *Continued.*

acting for the corporation in ordinary matters of business when interested, are incompetent to testify. *Blen* v. *Bear River Co.*, 435

13. *New trial—Review.*—When a motion for a new trial is founded entirely upon alleged errors of law in proceedings of the court below, the Supreme Court will review an order granting or refusing the motion. *Cochran* v. *O'Keefe*, 288

14. *New trial on weight of testimony.*—When the judge presiding has refused a new trial on the allegation that the verdict is contrary to the testimony, it must be a strong case where this court would overthrow such verdict. *Wood Hydraulic Mining Co.* v. *King*, 618

15. *Decree amended relative to surplus proceeds of sale.*—The Supreme Court will not reverse a judgment because the decree in a foreclosure suit does not provide for the disposition of the surplus proceeds of the sale, but will itself amend the decree. *Union Water Co.* v. *Murphy's Flat Co.*, 488

16. *Multifariousness.*—Where complainants claim by the same right, charge a common wrong, and pray a common redress, the bill is not multifarious. *Hand* v. *Dexter*, 608

See RESCISSION, 1, 5.

POSSESSION.

1. *Qualified possession.*—The possession of the owner of an easement is such qualified possession only as is essential to the enjoyment or assertion of the privilege. *Union Pet. Co.* v. *Bliven Pet. Co.*, 107

2. *A party in possession always has the right to buy his peace* from one asserting an adverse claim, and such compromises will always be upheld where no fraud has been committed. *Stonecifer* v. *Yellow Jacket Co.* 4

3. *Right to jury trial.*—A party in possession, claiming title, can not be divested of that possession without a trial at law before a common law court and a jury. *Id.*

See EASEMENT, 1; TRESPASS, 1.

PRINCIPAL AND SURETY.

1. *Indemnity to surety is indemnity to principal.*—Where a surety, or one standing in that position, for the payment of a debt, receives security for his indemnity or to discharge such indebtedness, the principal creditor is entitled to the security, although he may not have given credit on the faith of it or known of it at the time. *Rice's Appeal*, 639

PROSPECTING CONTRACT.

1. *Prospecting drill contract—Abandonment after assured indications of no coal.*—When under a written contract plaintiff was to make a drill hole for an agreed consideration, with a proviso that if plaintiff should "strike what is known as conglomerate or iron stone before he reached 300 feet he might abandon the work," in which event he was to be paid a ratable proportion of the price, and by another provision plaintiff at the option of defendant was to bore any number of feet not exceeding 400 at $4 per foot beyond 300 feet, and it appeared that the object was to find coal, and that coal was never found under the iron stone, it was *held*, that

PROSPECTING CONTRACT. *Continued.*

plaintiff could abandon on finding iron stone, no matter at what depth, and that the option contained in the latter clause was contingent upon such deposit not being first reached. *Lambert* v. *Fuller*, 202

2. *Contract to prospect for coal.*—Plaintiff made a contract with defendants under which they were to test his land for coal within a time limited. In case of failure to commence mining within one year they were to pay an annual rent which might afterward be applied as royalties on coal actually mined. They also had the right to abandon at any time. They did not abandon but kept possession without doing any prospecting. In an action for the annual rent it was *Held:* That if there was no minable coal on the land plaintiff could not recover, but that the burden of proof was on the defendants to prove such fact, which they could not do without making the development called for by the contract. *Cook* v. *Andrews*, 171

QUO WARRANTO—See CORPORATIONS, 47.

RATIFICATION—See CORPORATIONS, 43, 44.

RELOCATION.

1. *Abandonment—Second location within lines of first.*—Abandonment is a question of intention; and a second location within the lines of a previous location upon a blind lode not developed, for the express purpose of protecting the original location, is not an abandonment of the first. *Weill* v. *Lucerne Co.*, 372

RESCISSION.

1. *Practice—Decree for rescission.*—In an action in equity for the rescission of a contract for the sale of land on the ground of fraud, and also to have a mortgage and notes for purchase money released and canceled, a judgment which does not provide for an absolute rescission of the contract, but treats it as valid in part, and void in part, and cancels such notes and mortgage, permitting the purchaser to retain the land, can not be sustained. *Grant* v. *Law*, 80

2. *A contract will not be rescinded because it has become more burdensome* in its operation upon one of the parties than was anticipated, nor when the party has an adequate remedy at law will it be rescinded because the other has violated his engagements. *Rutland Co. v. Ripley*, 291

3. *Rescission not allowed, when—Quality.*—Where, under contract for coal of a certain quality, coal of an inferior quality has upon some of the deliveries been received and disposed of before its inferior quality was discovered, the buyer is in no position to rescind, but must rely upon his right of set-off or upon a separate action for damages. *Scott v. Kittanning Co.*, 159

4. *No partial rescission—Fraud.*—A party can not disaffirm a contract in part on the ground of fraud, and affirm it as to the residue. He must make his election either to rescind *in toto* by restoring all that he has obtained by it, in which case he may recover back what he has paid on it, or he may retain the property and sue for damages for the fraud. The rule

RESCISSION. *Continued.*

is the same in respect to both personal and real estate. *Grant* v. *Law*, 81

5. *Return of title papers.*—It is not essential that papers which have come to the hands of plaintiffs but were not accepted as passing any title should be returned before bringing suit. They should be filed with the clerk for the use of parties in interest. *Reddington* v. *Henry*, 32

See LACHES, 1.

RESERVATION—See PARTNERSHIP, 1.

SEAL—See CORPORATIONS, 35, 36.

SEVERANCE—See CONVEYANCE, 2, 3.

SPECIFIC PERFORMANCE.

1. *Specific performance—Continuous contract—Mutuality—Remedy, at law.*—A decree for specific performance is not a matter of right, but rests in the sound discretion of the court, and generally will not be made in favor of a party who has himself been in default. Another objection to such decree may be found in the peculiar character of the contract, *e. g.*, the contract being for a perpetual supply of marble. If performance be decreed the cause must remain in court forever, and the court can not superintend the execution of such a decree. Again, there is a want of mutuality; the decree could not be enforced against one of the parties because the contract stipulates that he may abandon it upon one year's notice, and, finally, the right of re-entry reserved in the contract gives a complete legal remedy so that specific performance will not be decreed. *Rutland Marble Co.* v. *Ripley*, 291

STATUTE.

1. *Adoption of statute of other State.*—In adopting substantially the statute of another State, the legislature is presumed to have intended that such statute shall receive the same construction given it by the courts of the State from which it was adopted. *Bradbury* v. *Davis*, 399

STATUTE OF LIMITATIONS.

1. *Statute of limitations on demand contracts.*—And that the statute of limitations did not begin to run until the demand was actually made. *Rhynd* v. *Hyndman*, 166

2. *Relief from fraud—Statute of limitations.*—Actions upon the ground of fraud must be instituted within three years after the discovery of the fraudulent acts relied upon as the ground of relief, or be forever barred. *Bradbury* v. *Davis*, 398

3. *The statute of limitation* and the rules as to presumptions from lapse of time are founded on the same principle, and neither can attach until there is some wrong done, or right withheld, because until then the party injured had no cause of complaint and no right to sue. *McBee* v. *Loftis*, 222

4. *Deed—Non-user.*—The right of mining can only be acquired by deed and is not forfeited by non-user of less than twenty years. *Id.*

See MORTGAGE, 4.

STOCK; STOCKHOLDERS.

1. *Relation of prior agreement of organizers to subsequent stockholders—Paying up capital with land.*—B., H. and S. were promoters of an association, under the act of July 18, 1863 (mining corporations), with a capital of $200,000. F. and M. united with them; afterward, September 29th, coal land was purchased by B., H. and S. for $125,000. A subscription book for stock was opened about October 1st; B., H. and S. subscribed for stock to the extent of $50,000; the subscription of the others, with a sixth name, amounted to $133,000, which B., H. and S. certified under the act had been paid in. The land was taken by the company; afterward subscriptions were made by other persons. In a suit by the company, against B. for his subscription, he alleged that the company, about October 1st, had agreed to take the land at an advance of $50,000, to be paid in stock, subject to the whole purchase money, and that his interest in the land, by the authority of the then corporators, was appropriated to pay his stock. *Held*, that such an agreement for the advance was no defense as against subsequent stockholders not apprised of the facts at the time of their subscription. *Held*, further, that such arrangement was not a valid payment of the stock, and that the act contemplated payment in money. *Bailey* v. *Pittsburg Gas Co.*, 599

2. *Stock, paid up, in leasehold.*—The provision of the code allowing *lands* to be taken in payment for stock of mining corporations does not authorize *leasehold interests* to be so taken, so as to exempt stockholders from personal liability. *Basshor* v. *Dressell*, 591

3. *Contract to deliver stock—Demand.*—Defendants contracted to deliver stock on or after a date named, upon demand. *Held*, that the contract being joint, and not a negotiable instrument, a demand upon one of the joint contracting parties was sufficient. *Rhynd* v. *Hyndman*, 166

4. *Transfer of stock—Collateral security—Depreciation.*—B., H. and C., owners of mining stock, authorized C. in writing to sell any part of it, subject to the approval of the other two, the proceeds to be divided among them in proportion to the stock owned by each, the first proceeds from the sales of B.'s share to stand pledged for the payment of a debt due from him to H. Afterward B. transferred the title of his stock to H. who recieved it "to be disposed of and proceeds paid in accordance with the foregoing agreement." Although the stock was valuable at this time, no sale was made by C., and B. did not request H. to sell any portion of that transferred to him. The stock gradually depreciated, and was finally sold by the treasurer of the company to pay assessments. *Held*, that the jury were warranted in finding that B.'s transfer to H. was a collateral security and not in payment of the debt; *Held*, also, that H. was not liable for the loss by depreciation through neglect to sell the stock, the authority to sell having been conferred upon C. exclusively. *Howard, Admr.*, v. *Brigham*, 1

5. *Stock, calls paid by payments to creditors—Presence at meeting of directors.—Inference.*—Carr subscribed for 250 shares of the capital stock of The Chartiers Coal Company, the par value being $20 per share; he paid in cash $10 per share and also received a receipt for $2,500 more on account of coal lands and contracts, conveyed by one Remington to the

STOCK; STOCKHOLDERS. *Continued.*

company, thus balancing the charge for his stock, $5,000. The act of incorporation provided that each stockholder in a corporation should be individually liable for its debts to the amount of the balance unpaid on his stock. The company issued bonds to the amount of $60,000 for the purpose of meeting liabilities; and afterward at a meeting of the directors, Carr being one of them and present, it was resolved that a prospective value had been placed upon the lands conveyed by Remington to the company, that only $10 per share had been paid on the stock; that $10 more per share be called in, and that stockholders neglecting to pay the additional installment might return their old certificates and receive new certificates to the amount of their actual cash payments. Carr tendered his original certificate and demanded a new certificate to the amount of his cash payment, which was refused. Upon suit by a bondholder against Carr to recover a sum alleged to be due and unpaid on his stock subscription, it was *held* that the receipts for land were good payments on the stock which could not be affected by an after discovered error in the judgment of the company as to the value of the lands. That the resolutions were binding only on the stockholders who consented to them That the presence of Carr at the meeting authorized no other inference than that he assented to them as a whole, and if he thus assented, he had a right to avail himself of the provisions for those who were unable or neglected to pay the additional installment. *Carr* v. *Le Fevre*, 477

6. *Shares of stock bought in by company.*—An oil company having bought in shares of its own stock, afterward divided them among the then stockholders *pro rata;* a stockholder who, between the time of the purchase and the time of such distribution, had assigned a part of his stock, sued the company for a *pro rata* of the shares, on the basis of the number held by him at the time of purchase. *Held*, that his action is an affirmance of the purchase, and he can not allege that the company's funds were misapplied; and that as to him, the distribution on the number of shares held by him at the time of distribution was equitable. *Coleman* v. *Columbia Oil Co.*, 483

7. *Substitution of bonds for stock—Dividends.*—A portion of the stock had been exchanged for bonds by consent of plaintiff, the vendee advancing a bonus to perfect the exchange. *Held*, that the bonds took the place of the stock, and were followed by the contract, the bonus of course being deducted upon an accounting; and that the plaintiff had no interest in dividends received by the vendee or the defendant upon the stock. *Jones* v. *Kent*, 190

8. *Stockholders' liability as partners.*—Stockholders of a mining corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. *Troubridge* v. *Scudder*, 471

9. *The personal liability of stockholders* can not be enforced in *assumpsit*, without a special count on the statutory liability. *Youghiogheny Co.* v. *Evans*, 102

STOCK; STOCKHOLDERS. *Continued.*

10. *Bill by minority against majority of stockholders.*—It is only in a strong case, and when the majority are clearly violating the chartered rights of the minority, and putting their interests in imminent danger, that a court of equity will, at the instance of the minority of the stockholders in a corporation, interfere with the management of its affairs and appoint a receiver, and in such a case a bill with mere general charges of fraud, illegality or mismanagement is demurrable. Such facts must be stated, as will, if true, clearly show illegal action by the majority, so as to endanger the interests of the minority and make the interference of court necessary for the protection of their rights. *Hand* v. *Dexter*, 608

See CONTRACT, 25; CORPORATIONS; INJUNCTION, 1, 2; PARTIES, 1; PLEADING AND PRACTICE, 1.

TAILINGS—See EASEMENT, 2.

TENANT IN COMMON.

1. *Deed of co-tenant by metes and bounds, void.*—The deed of a co-tenant purporting to convey *a portion* of the common estate by *metes and bounds*, is inoperative as against his co-tenants. The same rule applies to a conveyance of ore rights which are real estate. *Hartford Co.* v. *Miller*, 353

2. *Rule applied in this case.*—M. owned the soil of a certain tract in fee and one undivided seventh interest in the minerals. He conveyed a portion of the tract by metes and bounds and his interest in the ore rights under the particular portion conveyed. *Held*, that such deed was inoperative as against his co-tenants. *Id.*

3. *Reason of the rule—Defeated by acquiescence.*—The reason of the rule is the prejudice to the rights of the other co-tenants by so parceling the property. But the co-tenants having acquiesced by releasing to M., all parties are estopped, and the title is confirmed in the purchaser. *Id.*

4. *Injury to plaintiff's flume by consent of his co-owner.*—In an action to recover damages for an injury to a mining flume, caused by the defendants in cutting away a water ditch, the defendants offered to prove that one of the joint owners of the flume consented to the cutting of the ditch to avert other imminent dangers. *Held*, a good defense to the action for damages by the non-consenting co-owner. *Crary* v. *Campbell*, 270

5. *All co-owners are bound by the acts of each.*—The consent of one binds all, and the others can not maintain an action for injuries done by the consent of one. *Id.*

6. *Associate operating in aid of third party.*—A part owner in a contract for the purchase of a mine can not use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates. *Delmonico* v. *Roudebush*, 195

7. *Division of profits.*—In such case, his associate is entitled to share in the property obtained by such part owner for his individual benefit through the use of such contract, in proportion to his interest in the contract so made use of. *Id.*

8. *Mixed consideration.*—Such claim for division will not be defeated

TENANT IN COMMON. *Continued.*

by the fact that the property obtained by such part owner was not solely in return for the use of such contract. *Id.*

9. *Facts of the case, and result.*—A and B were part owners of a contract for the purchase of a claim to a mine. A used such contract for the purpose of procuring such claim for C without the consent of B, and also secured another outstanding title for the benefit of C. In return for these services, C gave A an interest in the mine. *Held*, that B was entitled to an interest in A's share of the mine, proportionate to B's interest in the original contract. *Id.*

TENDER—See VENDOR AND PURCHASER, 1.

TIME.

1. *Reasonable time.*—Where the facts are not disputed, the question of reasonable time is one of law for the court. *Morgan* v. *McKee*, 129

See BILLS AND NOTES, 1.

TORT—See CONTRACT, 18.

TRESPASS.

1. *Trespass against one in peaceable possession.*—An action for damages for trespass will lie against one who has been in the exclusive and peaceable possession of property for a month or more if his first entry was that of a trespasser. *Meyers* v. *Farquharson*, 217

2. *Special title in stranger—No defense to trespass.*—In a suit for trespass in digging and carrying away zinc ores, the pleadings showed a general title to the *locus in quo* in plaintiff, but a title to the zinc ores in a stranger, with whom defendants failed to connect themselves. *Held*, that this did not justify the conduct of defendants, and that plaintiff must have judgment on the pleadings. *Wallace* v. *Silsby*, 390

TRUSTS.

1. *Equitable owners bound by the contracts and compromises of the holders of the legal title.*—Jones was the owner of two hundred feet upon a mining claim, which was held adversely by third parties. He conveyed by deed absolute, to one Osborne, with a verbal agreement that Osborne should commence suit for the premises, and upon recovery, reconvey to him, Jones, seventy feet. Osborne commenced the suit, and Jones soon after contracted with one Stonecifer to convey ten feet of the property when recovered. Afterward Osborne settled the suit, and released to the defendant. *Held*, in an action by Stonecifer against the adverse party, to whom Osborne had released, in which a conveyance of the ten feet was prayed for, that Jones had no title to convey to Stonecifer; and that the settlement of the case was binding against Jones and his grantee. *Held*, further, that if Osborne, in settling, was guilty of any breach of trust, the remedy was in damages, and not *in rem*, even if the defendant had notice of the trust, and of the subsequent conveyance by Jones to Stonecifer. *Held*, further, that the case involved an issue of fact (the original title of Jones or Osborne never having been admitted by the defendant) which the defendant had a right to see determined in an action of eject-

TRUSTS. *Continued.*

ment, so that equity had no jurisdiction, and as Stonecifer had at best only an equitable interest, and the party who alone could sustain ejectment had disposed of his rights, he was, therefore, deprived both in law and equity of any specific relief, and could only sue for damages. *Stonecifer* v. *Yellow Jacket Co.*, 4

See CONVEYANCE, 22, 23; CORPORATIONS, 39; WARRANTY, 3, 4.

TUNNELS—See CONTRACT, 4; EQUITY, 4; LICENSE, 2.

ULTRA VIRES.

1. *Loan of money by water company not ultra vires.*—When the charter and the statutory law are silent as to what contracts a corporation may make, it has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created, and none other. The mere fact that a corporation, organized for the purpose of constructing ditches for the conveyance and sale of water, makes a loan of money, does not, of itself, make such contract void as an act exceeding its corporate powers. Such a contract may be necessary to enable it to attain the object for which it was created. In the absence of proof, its validity will be presumed. *Union Co.* v. *Murphy's Flat Co.*, 487

2. *Judicial conclusions from corporate name—No ultra vires after benefits received, against executed contract.*—Where a corporation, organized in Illinois, had borrowed large sums of money which it had used in Colorado Territory, for which money it had given its notes, now held by Ballard and others, the court refused to issue an injunction at the instance of a stockholder, to restrain the collection of such notes, on the ground of the corporation having exceeded its powers by operating beyond the State, because: 1. From the very corporate name of the company, "North Star Gold and Silver Mining Company," the complainant must have known that it was not intended to mine in the State of Illinois; 2. That in any event, the contract was an executed one, and one of which the corporation had already received all the benefit; to which class of contracts, at such stage, corporations can not object that they were *ultra vires;* 3. That a stockholder who failed to apply for a restraining writ while the contract remained executory, will be presumed to have assented to such contract. *Bradley* v. *Ballard*, 563

3. *Municipal and private corporations distinguished.*—Municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers can not be made binding upon the tax payers, from the presumed assent of the latter. *Id.*

See CORPORATIONS, 51.

VENDOR'S LIEN—See CONTRACT, 8.

VENDOR AND PURCHASER.

1. *Tender of insufficient title.*—Where there is an agreement for the

VENDOR AND PURCHASER. *Continued.*

sale of an interest in land and the vendor (or lessor) refuses to execute an instrument completing it, but insists upon tendering an inferior or lesser estate, the contract may be regarded as broken and the purchaser may sue for the consideration advanced with interest. *Reddington* v. *Henry*, 31

See FRAUD, 4–10.

WARRANTY.

1. *Warranty—Measure of damages—Gold dust.*—The measure of damages against grantors warranting the title to a ditch and water; *Held*, to be the value at the time of the conveyance, with interest, costs, etc., without regard to the known use which grantees intended to make of the water. *Held*, further, that the consideration in the deed being $2,000 in clean gold dust, only $2,000 in currency could be collected for such consideration. *Taylor* v. *Holter*, 322

2. *Warranty in deed of release.*—A deed in which the grantor remised, released and quit-claimed all that certain water-right lying, etc., as distinguished from the interest of the grantor in the water-right, followed by a covenant of general warranty: *held*, to be a bargain and sale when supported by a full consideration, and that the grantor had warranted the title. *Id.*

3. *Liability of trustees for personal warranty of title.*—The grantors in a warranty deed, who held the title as trustees for a third party, to whom the consideration was paid, are liable on their personal covenants in the deed, though they were under no obligation to make a personal covenant of warranty. *Id.*

4. *Trustee, the proper plaintiff in a suit on warranty.*—A deed containing certain covenants of warranty not running with the land, was made to a trustee who afterward released to his *cestui que trust*. *Held*, that the trustee was the proper plaintiff in an action on the covenants; that the fact that the *cestui que trust* furnished the consideration money, did not alter the case, and that whatever was recovered would be followed by the trust. *Hartford Co.* v. *Miller*, 353

See MEASURE OF DAMAGES, 2; MISTAKE, 1.

WORKINGS—See LEASE, 1.

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